Petition

81-1675

Office - Supreme Court, U.S.
FILED
MAR 8 1982
ALEXANDER L. STEVAS,
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No. _____

In The

Supreme Court of the United States

October Term, 1981

FRANK KUSH, WILLIAM MASKILL,
FRED L. MILLER and GARY HORTON,
Petitioners,

vs.

KEVIN RUTLEDGE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Ninth Circuit Court of Appeals holding, that the Eleventh Amendment does not protect three football coaches and the athletic director for Arizona State University from Mr. Rutledge's claims for money damages in federal court, conflict in principle with this Court's decisions in *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945) and *Edelman v. Jordan*, 415 U.S. 651 (1974)?

2. Should this Court settle the important federal question of whether invidiously discriminatory animus is required for all causes of action under 42 U.S.C. § 1985(2), and thereby resolve the schism between the D.C., Third and Ninth Circuit Courts of Appeal on the one hand and the Fifth and Eighth Circuits on the other?

LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The parties to the proceedings in the United States Court of Appeals for the Ninth Circuit were Kevin Rutledge, Frank Kush, William Maskill, Fred L. Miller, Gary Horton, the Arizona Board of Regents, and Arizona State University.

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OPINIONS BELOW

The Honorable William P. Copple, Judge of the United States District Court for the District of Arizona, rendered an unpublished Judgment on November 29, 1979. Appendix A depicts a copy of the unpublished Memorandum and Order of November 29, 1979, in support of the district court's Judgment dismissing Mr. Rutledge's First Amended Complaint and action in its entirety.

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 660 F.2d 1345 (9th Cir. 1981); a copy appears as Appendix B.

A copy of the Order of the United States Court of Appeals for the Ninth Circuit, denying the Petitions for Rehearing filed by plaintiff-appellant Rutledge and defendant-appellee Miller, is attached as Appendix C.

JURISDICTION

Following his initial Complaint filed on September 19, 1979, Mr. Rutledge filed a First Amended Complaint on September 21, 1979, against the Arizona Board of Regents (hereinafter the "Board"), Arizona State University (hereinafter "ASU"), Frank Kush, ASU's head football coach (hereinafter "Kush"), William Maskill, an ASU assistant coach (hereinafter "Maskill"), Gary Horton, another ASU assistant coach (hereinafter "Horton") and Fred L. Miller, ASU's athletic director (hereinafter "Miller") in the United States District Court for the District of Arizona.

On November 29, 1979, the United States District Court for the District of Arizona entered final Judgment dismissing the First Amended Complaint and action as to all defendants.

The United States Court of Appeals for the Ninth Circuit affirmed in part and reversed and remanded in

part on November 12, 1981. See Appendix B. That court thereafter denied timely filed Petitions for Rehearing by Messrs. Rutledge and Miller on December 8, 1981. See Appendix C. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions and statutes involved are U.S. Constitution, Article III, Sections 1 and 2; U.S. Constitution, Amendment XI; 42 U.S.C. § 1985; Ariz. Rev. Stat. Ann. § 12-821; Ariz. Rev. Stat. Ann. § 41-621; and, Ariz. Rev. Stat. Ann. § 41-622. A copy of each appears in Appendix D.

STATEMENT OF THE CASE

Mr. Rutledge filed his First Amended Complaint against defendants he described as follows: the Board and ASU are agencies of the State of Arizona; Kush, Maskill, Horton and Miller were at all material times employees of ASU, serving as head football coach, assistant football coaches and athletic director, respectively. The United States District Court for the District of Arizona dismissed the action in its entirety.

The First Amended Complaint identified Mr. Rutledge's role as a college football player at ASU. Rutledge alleged that he accepted a football scholarship at ASU prior to fall, 1978. Kush assertedly granted Rutledge's request that he be allowed to sit out the 1978 season ("red-shirted"). According to Rutledge, Kush subsequently called him a liar, subjected him to ridicule in front of the team for claiming to have been "red-shirted," and required Rutledge to serve as a punter.

On October 29, 1978, during the ASU — Univer-

sity of Washington game, Rutledge assertedly returned to the bench following what Kush considered to be a poor punt. Kush allegedly threw a punch under the face mask of Rutledge's helmet, and thereby purportedly struck Rutledge on the mouth. Rutledge alleged that Kush publicly ridiculed him after this incident. There was no allegation that Maskill, Miller or Horton assaulted or battered Rutledge.

During spring, 1979 practice, according to the First Amended Complaint, Maskill embarrassed and ridiculed Rutledge in front of his teammates and Kush asked Rutledge to quit the team. Rutledge claimed to have been singled out for abuse, scorn and ridicule by Kush and Maskill during the remainder of spring practice, 1979. Rutledge further alleged that ASU, the Board and Miller failed to supervise and control their agents, Kush and Maskill.

Rutledge also stated that under National Collegiate Athletic Association ("NCAA") rules, once an athlete has been granted a scholarship it may be revoked only for good cause and after a proper hearing, if so requested by the athlete. Rutledge did not contend that he attempted to exercise his scholarship hearing rights under NCAA rules. Instead, Rutledge alleged that he was forced to leave ASU and its football squad and transfer to the University of Nevada at Las Vegas without a scholarship.

The First Amended Complaint contained five counts, each of which incorporated all general allegations and included claims for monetary damages. Count One charged that Kush had conspired with his assistant coaches to deprive Rutledge of his scholarship and his NCAA hearing rights. This was allegedly accomplished by means of harassment, embarrassment, defamation and intentional infliction of mental distress, and assert-

edly deprived Mr. Rutledge of an advantageous business and educational relationship with ASU.

Count Two accused Maskill of defaming, publicly ridiculing and intentionally inflicting emotional distress upon Rutledge. It alleged that Maskill did so both on his own initiative and in conspiracy with Kush in an effort to cause Rutledge to abandon his scholarship and transfer to another school.

Count Three charged the Board, ASU and athletic director Miller with vicarious liability and failure to supervise Kush and Maskill adequately.

Count Four alleged that Kush and Maskill, under color of state law, deprived Rutledge of rights, privileges and immunities under the Constitution and thereby violated 42 U.S.C. § 1983.

Count Five identified claimed violations of 42 U.S.C. § § 1983 and 1985. It alleged that "Kush, Miller and Horton have conspired to prevent, by intimidation and threat, various material witnesses from freely, fully and truthfully testifying as to matters raised in the within complaint."

Count Five further stated that Kush, Miller and Horton had conspired to hinder or obstruct "the due course of justice with an intent to deny the plaintiff equal protection of the laws by threatening and intimidating potential material witnesses, to prevent the plaintiff from lawfully enforcing his rights and to 'cover up' the wrongful acts of defendants Kush and Maskill." Also, Kush and Miller allegedly conspired by means of false and inflammatory statements to encourage others to deter Rutledge from enforcing his legal right to pursue claims against the defendants.

Rutledge described all acts identified in Count Five as "a conspiracy to deny the plaintiff equal protection of the laws and equal privileges and immunities un-

der the laws." Appendix E sets forth a copy of the First Amended Complaint.

Before bringing his lawsuit, Rutledge "[p]ursuant to the provisions of A.R.S. § 12-821" had presented to the Arizona Board of Regents an unsuccessful "claim based on the facts alleged herein." All parties moved, *inter alia*, to dismiss the district court case for lack of jurisdiction under the Eleventh Amendment. Kush, Maskill, Horton and Miller also moved to dismiss for Rutledge's failure to state a claim under 42 U.S.C. § § 1983 or 1985.

The Ninth Circuit Court of Appeals affirmed in part and reversed and remanded in part the district court's Judgment dismissing the action in its entirety. The Ninth Circuit completely affirmed the dismissal of the Board and ASU; it held that the Eleventh Amendment precluded the suit against those entities in federal court.

In so ruling under the Eleventh Amendment, the Ninth Circuit appropriately noted that the Board and ASU use "state funds" and "that such funds may have been derived from insurance proceeds does not alter this conclusion [citations omitted]." *Rutledge v. Arizona Board of Regents*, 660 F.2d 1345, 1349 (9th Cir. 1981).

The Ninth Circuit also held that the Eleventh Amendment barred Count Three's charges against Miller for vicarious liability based on Kush's and Maskill's acts. The court emphasized that "[s]uch liability, if established, would rest solely upon his [Miller's] position as an official of Arizona State University." 660 F.2d at 1350. "The fact that Miller is the nominal defendant in this aspect of the plaintiff's case does not preclude the operation of the Eleventh Amendment's bar." *Id.*

The Ninth Circuit, however, reached a contrary conclusion as to the negligent supervision and 42 U.S.C. § 1985(2) charges against Miller, and the various claims

against Kush, Maskill and Horton. The court acknowledged the existence of Ariz. Rev. Stat. Ann. § 12-821 and Ariz. Rev. Stat. Ann. § 41-621, but evaluated those provisions as insufficient to invoke Eleventh Amendment protection.

While this aspect of its Eleventh Amendment ruling resulted in partial reversal and remand to the district court, the Ninth Circuit noted the probability "that some or all of appellant's claims will be barred by the doctrines of res judicata and collateral estoppel. Proceedings in the state court have occurred with results to date adverse to appellant." 660 F.2d at 1351.

Moving on to whether Mr. Rutledge had stated claims under 42 U.S.C. § § 1983 and 1985, the Ninth Circuit first found that no cognizable 42 U.S.C. § 1983 action existed. It then split consideration of the 42 U.S.C. § 1985(2) claim between the first and second portions of that subsection.

Concluding that Mr. Rutledge had adequately alleged a claim under the first portion of § 1985(2), the court was "influenced in reaching this decision by the fact that the proper scope of part one of section 1985(2) previously has been uncertain and that the relationship between the parts of section 1985(2) has been obscure to some extent." 660 F.2d at 1355. Because there existed "no sufficient allegation of racial or class-based invidiously discriminatory animus," the Ninth Circuit ruled that Mr. Rutledge did not allege a proper claim under the second part of § 1985(2). *Id.*

The jurisdiction of the Ninth Circuit Court of Appeals rested on 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

I. *The Ninth Circuit Court of Appeals Holding, that the Eleventh Amendment Does Not Protect Three Football Coaches and The Athletic Director for Arizona State University From Mr. Rutledge's Claims for Money Damages In Federal Court, Conflicts In Principle With This Court's Decisions in Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945) and Edelman v. Jordan, 415 U.S. 651 (1974).*

A. *State funds would to a "virtual certainty" pay any money judgment that Mr. Rutledge might reasonably hope to secure, entitling the State to invoke Eleventh Amendment protection on behalf of the individual officials who are nominal defendants.*

Under the State of Arizona's risk management system, it is the real and substantial party in interest when an ASU athlete sues his coaches and the athletic director. Accordingly, those state officials are entitled to invoke the Eleventh Amendment's protection under this Court's guiding principle: "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974), citing *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945).

Through risk management, Arizona appropriates money to procure private insurance, provide self-insurance and cover excess damage awards for the "state and its departments, agencies, boards and commissions and all officers, agents and employees thereof, against liability for acts or omissions of any nature while acting in authorized governmental or proprietary capacities and

in the course and scope of employment or authorization except as prescribed by this chapter." Ariz. Rev. Stat. Ann. § 41-621.A.3.

The risk management statutes further establish that a state officer, agent or employee will not pay damages from his own pocket for an injury resulting "from his act or omission in a public official capacity where the act or omission was the result of the exercise of the discretion vested in him if the exercise of the discretion was done in good faith without wanton disregard of his statutory duties." Ariz. Rev. Stat. Ann. § 41-621.G.

This Court may take judicial notice of these provisions, as well as the others that complete the risk management program implemented by the State to cover its officers, agents and employees. *See, e.g., Patterson v. City of Phoenix*, 103 Ariz. 64, 436 P.2d 613 (1968) (Arizona Supreme Court took judicial notice of statutes, including a predecessor of Ariz. Rev. Stat. Ann. § 41-621, that permitted insuring governmental agents).

In so doing, this Court will observe that State legislative appropriation provides the funds for the State's liability loss coverage and risk management. Ariz. Rev. Stat. Ann. § 41-622.D. Whenever such funds are exhausted while the legislature is in session, the department of administration may request a special legislative appropriation. Ariz. Rev. Stat. Ann. § 41-622.G. If liability loss funds are exhausted when the legislature is not in session, any final judgment payable from State funds accrues interest until the department of administration seeks an appropriation at the next regular session. *Id.*

The scope of State appropriations includes monetary relief sought in this lawsuit, a gridiron controversy between a "Pac Ten" football player and those adminis-

tering ASU's athletic program. The primary focus of Mr. Rutledge's case is money damages.[1]

By his tort claims against Kush, Maskill, Horton and Miller, Mr. Rutledge seeks recompense for their allegedly poor exercise of discretion in operating the ASU football program as it related to him. The gist of Mr. Rutledge's 42 U.S.C. § 1985(2) claim is that two coaches and the athletic director for ASU, acting with the power of their offices behind them, improperly exercised their discretion to intimidate and threaten witnesses from freely testifying. The individual state officials here, insulated from personal liability by Ariz. Rev. Stat. Ann. § § 41-621 to -622, satisfy the test established by this Court for Eleventh Amendment application:

> [The damage award sought] requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination [as had *Ex Parte Young* and its progeny], but as a form of compensation . . . *It will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials* who were defendants in the action.

Edelman v. Jordan, 415 U.S. 651, 668 (1974) (emphasis added).

In *Edelman*, the plaintiffs had brought suit under 42 U.S.C. § 1983 against officials of the Illinois Department of Public Aid requesting retroactive payment of

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[1]Mr. Rutledge's 42 U.S.C. § 1985(2) claim apparently sought both monetary damages as relief, and an injunction against Kush, Miller and Horton violating that section. (See Appendix E). While the petitioners submit that Mr. Rutledge cannot state a 42 U.S.C. § 1985(2) claim, if this Court should reach a contrary conclusion, the petitioners acknowledge that certain requests for non-monetary, prospective, injunctive relief are not barred by the Eleventh Amendment under *Ex Parte Young*, 209 U.S. 123 (1908).

benefits. Applying the "virtual certainty" test, the Court denied recovery under the Eleventh Amendment.

Likewise, any judgment that Rutledge might secure would to a "virtual certainty" be paid by the State under Ariz. Rev. Stat. Ann. § § 41-621 to -622. It would not come from the pockets of the ASU coaches and athletic director.

In apparent recognition of this, before suing in federal district court Mr. Rutledge followed the claims procedure prescribed as a prerequisite to suit by Ariz. Rev. Stat. Ann. § 12-821. The plaintiff in another case before this Court had similarly followed a mandatory state claims statute before suing both the state's department of treasury and the individuals who carried out the department's work. *Ford Motor Co. v. Department of Treasury,* 323 U.S. 459, 463 (1945).

The Court in *Ford Motor Co.* found the case brought in reliance on a state claims statute, evaluated its essential nature and effect as a suit against the state, and imposed the Eleventh Amendment as a bar to the entire action. This Court in like manner may view the State of Arizona as the real party in interest, entitled to invoke the Eleventh Amendment on behalf of individual officials who are nominal defendants.

Other federal courts have found that the Eleventh Amendment protects university officials from suit for money damages. *E.g., Long v. Richardson,* 525 F.2d 74 (6th Cir. 1975). *Long* involved a suit for money damages against particular officials of Memphis State University ("MSU"). The court emphasized that MSU was a creature of the state, the defendants were charged with acting in their official capacities, and any judgment entered would be paid from state funds under Tennessee statute. *Id.* at 75.

Similarly, in *Allah v. Commissioner,* 448 F. Supp.

1123 (N.D.N.Y. 1978), the court dismissed a claim for money damages against the Commissioner of New York's Department of Correctional Services. The court concluded that any funds recovered would have to come from the state treasury, and that this barred the lawsuit. *Id.* at 1125.

Federal authority permits a court to construe a complaint against state employees to determine whether it asserts liability against them in their official capacity only, or seeks to impose personal liability. *See Martin v. University of Louisville*, 541 F.2d 1171, 1176-77 (6th Cir. 1976); *Farr v. Chesney*, 441 F. Supp. 127 (M.D. Pa. 1978). In *Farr*, the plaintiff sued nine commissioners in both their individual and official capacities, but the district court determined that none of the defendants were individually liable. The court reasoned that the substance of the remedy, and not its label, controlled. Accordingly, the Eleventh Amendment barred the action.

This Court may properly determine, as did the district court, that Rutledge stated a claim against Kush, Maskill, Miller and Horton in their official capacities only. No other conclusion follows from Rutledge's claims against the Board and ASU as principals and employers of individuals who allegedly acted in their official capacities at all times. (See Appendix E).

B. *The Ninth Circuit largely ignored major Eleventh Amendment principles applicable to state officials; this Court should correct this oversight as to the petitioners, who operated in their capacities as coaches and athletic director for ASU.*

Largely ignoring the foregoing analysis in resurrecting Mr. Rutledge's case against the state officials, the Ninth Circuit pointed in part to an Arizona opinion about the erosion of the judicial doctrine of sovereign

immunity. 660 F.2d at 1350, citing *Stone v. Arizona Highway Commission*, 93 Ariz. 384, 381 P.2d 107 (1963).[2]

The *Stone* opinion simply established the rule that Arizona public officers may be sued in state court for their own misfeasance and negligence. That opinion did not waive Eleventh Amendment protection for state officials in federal court, nor does any Arizona statute indicate the State's consent to suit in federal court when its officials are nominal defendants.

Contrary to the Ninth Circuit's oblique inferences about waiver, this Court has established its standard:

> Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." [citation omitted].

Edelman v. Jordan, 415 U.S. 651, 673 (1974); *see also Quern v. Jordan*, 440 U.S. 332 (1979).

Consistent with the principle that a state may waive Eleventh Amendment protection only by express language or overwhelming textual implications, a state's amenability to suit in its own courts does not thereby waive the Eleventh Amendment rights of state officials.

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[2]Acknowledging that the vicarious liability charges against Miller, if established, would rest solely upon his position as an ASU official, the Ninth Circuit properly concluded that the "fact that Miller is the nominal defendant in this aspect of the plaintiff's case does not preclude the operation of the Eleventh Amendment's bar [citing *Ford Motor Co.*, 323 U.S. at 464]." 660 F.2d at 1350.

Cf. Kennecott Copper Corp. v. Tax Commission, 327 U.S. 573, 577-80 (1946).

Skirting any serious analysis of the plight of a state whose officials, when sued, are concomitantly buttressed by the state's loss liability protection, the Ninth Circuit further relied on two early opinions of this Court. Each failed to illuminate the issues raised by the action against ASU's coaches and athletic director.

In the first, *Hopkins v. Clemson College*, 221 U.S. 636 (1911), the question was whether a public corporation — the Board of Trustees governing Clemson College (which Mr. Clemson had bequeathed to the State of South Carolina under terms set forth in his will) — could avail itself of Eleventh Amendment immunity from suit. There was no analysis of the Eleventh Amendment as it might apply to state officials.

In the other, *Johnson v. Lankford*, 245 U.S. 541 (1918), an insurance company was a defendant because it had guaranteed the faithful performance and fidelity of the other defendant, the bank commissioner. Due to the insurance company's payment obligations, there was no possibility in *Johnson* that state funds would pay any judgment ultimately obtained against the bank commissioner.

In all events, the Court here deals with a constitutional question, and to the extent anything in *Hopkins* or *Johnson* is contrary to the Court's subsequent opinions, it may be disapproved. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 677 (1974) ("Since we deal with a constitutional question, we are less constrained by the principle of stare decisis than we are in other areas of the law.").

Most significantly, the essential nature and effect of this proceeding warrants the conclusion that any money damages recovered by Mr. Rutledge would to a virtual certainty be paid under Arizona's risk manage-

ment system — from the State's coffers and not individual pockets. In this action the individual defendants are entitled to Eleventh Amendment protection; the action is in essence one for recovery of money from the State. *See Ford Motor Co.*, 323 U.S. at 464.

Nothing exists to change the district court's initial and appropriate conclusion that the Eleventh Amendment absolutely barred Mr. Rutledge's federal court claim against the State and its officers — Kush, Miller, Horton and Maskill — operating in their capacities as coaches and athletic director for ASU.

II. *The United States Courts of Appeal for the Eighth and Fifth Circuits Have Decided an Important Question of Federal Law, Appropriately Ruling that Invidiously Discriminatory Animus is Required for All Claims Brought Under 42 U.S.C. § 1985(2), While the D.C., Third and Ninth Circuits Have Held to the Contrary, and This Court Should Settle This Important Question.*

A. *Well-reasoned judicial construction in Griffin v. Breckenridge, 403 U.S. 88 (1971), confirmed the "invidiously discriminatory animus" criterion for § 1985(3) actions, and this Court may likewise by analysis of text, companion provisions and legislative history require all § 1985(2) claimants to meet that standard.*

Relevant portions of 42 U.S.C. § 1985(2) read as follows:

> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, . . . ; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any

> manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Id.

Mr. Rutledge's remaining 42 U.S.C. § 1985(2), first portion, claim after the Ninth Circuit opinion is this: "[o]n information and belief, since the time of filing the statutorily mandated claim with the Arizona Board of Regents, defendants Kush, Miller and Horton have conspired to prevent, by intimidation and threat, various material witnesses from freely, fully and truthfully testifying as to matters raised in the within complaint." (See Appendix E). These are the complaint allegations that fall within the first part of § 1985(2).

As the terms of 42 U.S.C. § 1985(2) exhibit, that subsection contains no remedial provision. Instead, 42 U.S.C. § 1985(3) states the circumstances under which there is a civil cause of action for any of the 42 U.S.C. § 1985 conspiracies:

> [I]n any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3). The interrelationship between subsections (2) and (3) of § 1985 is thus evident.

Scrutinizing the text, companion provisions and

legislative history of 42 U.S.C. § 1985(3), this Court in *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971), concluded that "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." The words "invidiously discriminatory animus" nowhere appear on the face of 42 U.S.C. § 1985, yet this Court properly applied that requirement to the subsection before it, as a necessary limit on the types of plaintiffs entitled to sue under this Reconstruction Era civil rights statute.

In so doing, this Court gave "full effect to the congressional purpose [of the 1871 Reconstruction Era Congressmen] — by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment." 403 U.S. at 102. The Court both limited the category of possible plaintiffs to those who suffer invidious discrimination, and broadened the potential defendant group to those who conspire privately as well as under color of state law. 403 U.S. at 101.

In this case, the issue is not whether the defendants are appropriate targets. Mr. Rutledge has alleged that the individual officials acted under color of state law, and they are within the category of defendants who may be sued under 42 U.S.C. § 1985. Instead, the significant question before this Court is whether the "invidiously discriminatory animus" criterion applies to plaintiffs under all § 1985(2) claims, as it does under § 1985(3).

Both 42 U.S.C. § 1985(2) and § 1985(3) originated from the Ku Klux Klan Act, 17 Stat. 13, Section 2 (1871).[3]

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[3]The Fifth Circuit Court of Appeals in *Kimble v. D. J. McDuffy, Inc.*, 648 F.2d 340, 344, n. 5, 345, n. 6 (5th Cir. 1981), set forth in full Section 2 of the Ku Klux Klan Act and explained its transfer to the Revised Statutes. At 648 F.2d 346, 347, n. 7, that court stated: "[a] careful reading of Section 2 of the Ku Klux Klan Act, set out in note 5, *supra*, indicates that portions of that section are the source of Section 1985(3) as well as Section 1985(2)."

The 1871 Congress directed this legislation to conspiracies, whether in state or federal court, impelled by class-based racial or political motives, or a commingling of both.

The foremost concern of those legislators was invidious discrimination, whether in the form of murder, property deprivation or perjury, practiced against citizens whose political affiliations were imbued with racial implication. As representative Shellabarger, who promoted the legislation, warned the House of Representatives in 1871:

> [T]he South and ruling half of the Democratic party is now engaged in the business of *overthrowing the political rights of the freed race* and of all constitutions and laws securing them, [an overthrow that] is satisfactorily progressing under the cover of the night and the mask, and of *perjury, by means of scourgings, burnings and butcheries* . . .
>
> * * *
>
> So it was at Memphis, where they killed and wounded their scores of *defenseless and unoffending Republicans — colored people.*
>
> * * *
>
> [*The conspirators*] *are* men whose attachment to our Government was indicated to us first at Manassas, last at Appomattox; men banded first under oaths of traitors, now of oaths of *traitors, perjurers, and assassins;* . . . men whose scourged, mangled, banished, and murdered *victims number* now, by proximate estimates, hundreds of thousands of this Republic's *free citizens, struck because they assumed to have and use, the high franchises of such citizens;* . . . men whose purposes are disclosed to us by testimony, sworn and overwhelming, to be the *destruction of the political rights of an entire race of American citizens* . . .
>
> * * *

> Know right well that *this revolution, whose outcome was to change an immortal chattel into an immortal citizen,* is like all the rest of revolutions in favor of liberty which lie along the highway of the ages — it *takes no step back!*

Cong. Globe, 42d Cong., 1st Sess. 516-19 (1871) (emphasis added).

The United States Court of Appeals for the D.C. Circuit has identified representative Shellabarger's role as the proponent of the Ku Klux Klan Act of 1871, and identified specifically his remarks at Cong. Globe, 42d Cong., 1st Sess. 519 (1871). *McCord v. Bailey,* 636 F.2d 606, 615 (D.C. Cir. 1980), *cert. denied,* 451 U.S. 983 (1981).

The D.C. Circuit in *McCord,* however, misinterpreted the legislative history to conclude that "Congress must have intended its measure [what today is the first portion of 42 U.S.C. § 1985(2)] to reach more than attacks on government operations to further racial or other invidious discrimination, at least to the extent the Constitution permitted Congress to act." 636 F.2d at 615. Instead, while the 1871 congressmen identified potential anarchy in the southern states, that very chaos arose from conspiratorial actions against blacks, who had previously been chattels and were now citizens, and the Republicans who supported their newly found rights as the freed race.

By contrast to the D.C. Circuit in *McCord,* this Court in *Griffin v. Breckenridge,* 403 U.S. 88 (1971), effectively illuminated the intent behind 42 U.S.C. § 1985. In *Griffin,* the Court drew heavily on the 1871 legislative history, including representative Shellabarger's comments, in imposing the "invidiously discriminatory animus" criterion for § 1985(3) actions. 403 U.S. at 102. Well-reasoned judicial construction added those words, which are absent from the face of the statute.

This Court may appropriately follow that brand

of statutory understanding and impose the "invidiously discriminatory animus" requirement on all of 42 U.S.C. § 1985(2). No rule of law precludes legislative history analysis just because someone finds plain language in the statute. *Cf. Cass v. United States*, 417 U.S. 72, 78-79 (1974). Not only does *Griffin* provide ample precedent, but also, " 'courts, in construing a statute, may with propriety recur to the history of the times when it was passed.' " *Great Northern Railway Co. v. United States*, 315 U.S. 262, 273 (1942), quoting *United States v. Union Pacific Railroad Co.*, 91 U.S. 72 (1876).

B. *By setting the standard that all § 1985(2) claimants must show "invidiously discriminatory animus," this Court would resolve the schism between the D.C., Third and Ninth Circuits on the one hand, which have misconstrued the legislative intent behind § 1985(2), and the Fifth and Eighth Circuits on the other.*

The United States Courts of Appeals for the D.C., Third and Ninth Circuits have brushed aside the manifest intent of the 1871 Congress. *See McCord v. Bailey*, 636 F.2d 606 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981); *Brawer v. Horowitz*, 535 F.2d 830, 840 (3d Cir. 1976) (*dictum*); *Rutledge v. Arizona Board of Regents*, 660 F.2d 1345 (9th Cir. 1981).

In 1977, after the Third Circuit's opinion in *Brawer*, this Court denied a petition for certiorari in *Jones v. United States*, 401 F. Supp. 168 (E.D. Ark. 1975), *aff'd*, 536 F.2d 269 (8th Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977). That denial left intact the Eighth Circuit's holding in *Jones*: all plaintiffs suing under any portion of § 1985(2) must establish racial or other class-based animus.

On May 18, 1981, this Court denied a petition for certiorari in *McCord v. Bailey*, 636 F.2d 606 (D.C. Cir.

1980), *cert. denied,* 451 U.S. 983 (1981). Relying on *Brawer,* the D.C. Circuit in *McCord* had ruled: "[W]e do not believe a class-based, invidiously discriminatory intent is an element of a cause of action under the first clause of section 1985(2)." 636 F.2d at 614.

Between May 18, 1981 and the present, the Fifth Circuit, in *Kimble v. D. J. McDuffy, Inc.*, 648 F.2d 340 (5th Cir. 1981), aligned itself with the Eighth Circuit (*Jones*), and the Ninth Circuit in *Rutledge* sided with the D.C. and Third Circuits (*McCord* and *Brawer*). The distinct split among these circuits, which have all reviewed the guiding principles of *Griffin,* warrants this Court's resolution of a significant federal question. Left unresolved, this issue will continue to entangle the lines of appropriate civil rights redress in the federal courts.

The D.C., Third and Ninth Circuits, unless this Court stops them, will extend 42 U.S.C. § 1985(2), first portion, claims to all Americans, regardless of their racial or class status, for civil conspiracy to obstruct federal justice. This would create one set of conspiracy rules for § 1985(2) plaintiffs with federal court claims, and another set for individuals who sue under the same statutory section for state court obstruction of justice.

Under the logic of the *McCord, Brawer* and *Rutledge* opinions, a plaintiff with a § 1985(2) state court obstruction-of-justice claim must belong to a class to which invidious discrimination attaches, while anybody can bring such a federal court claim. This disparity in treatment flies in the face of state court concurrent jurisdiction over § 1985(2) claims. *See, e.g., New Times, Inc. v. Arizona Board of Regents,* 110 Ariz. 367, 374, 519 P.2d 169, 176 (1974) (Arizona Supreme Court concluded that state court had jurisdiction to entertain damages claim under 42 U.S.C. § 1983); 28 U.S.C. § 1343 (statute grants original but not exclusive jurisdiction to federal courts

for hearing 42 U.S.C. § 1985 and other civil rights claims).

The D.C., Third and Ninth Circuits base this bifurcated analysis of § 1985(2) on the lack of express "equal protection" language in its first portion. Those words appear in the second half of § 1985(2) directed to state courts; the "equal protection" terms ground that portion on congressional power under "the Fourteenth Amendment, which in terms speaks only to the States . . ." *Griffin v. Breckenridge,* 403 U.S. at 96, 97. Given the Constitutional grant of judicial and legislative power over federal courts, Congress needed no "equal protection" peg as justification for seeking to end invidious discrimination in federal courts. *See* U.S. Constitution, Article III, Sections 1 and 2.

Understandably, the Fifth and Eighth Circuits have upheld the "invidiously discriminatory animus" criterion for all of § 1985(2). *Kimble v. D. J. McDuffy, Inc.,* 648 F.2d 340 (5th Cir. 1981); *accord, Jones v. United States,* 401 F. Supp. 168 (E.D. Ark. 1975), *aff'd,* 536 F.2d 269 (8th Cir. 1976), *cert. denied,* 429 U.S. 1039 (1977). Instead of focusing on whether Congress was empowered to enact legislation forbidding retaliatory conduct against parties or witnesses in all federal court lawsuits, the courts in *Kimble* and *Jones* concluded that Congress had not so acted in the first portion of § 1985(2).

The Fifth Circuit in *Kimble* specifically rejected the district court's opinion that since Congress failed to include the equal protection language in the first half of § 1985(2), "it must have intended to protect the entire process of litigation without any racial or class-based animus requirement." 648 F.2d at 346.

The court in *Kimble* properly highlighted, by contrast, the concern evidenced by this Court in *Griffin*: § 1985 actions must be "carefully delineated in accord-

ance with the statutory purposes of the Act in order to avoid the unintended creation of a general federal tort law." 648 F.2d at 346. It emphasized also that both § 1985(2) and § 1985(3) are liberally laced with references to "equal protection," but neither includes those words in each of its clauses.

Relying on the *Griffin* analysis, which avoided "hypertechnical analysis of the structure and grammar of the section [§ 1985(3)]," the Fifth Circuit in *Kimble* concluded that "[i]f racial or class-based animus is required by Section 1985(3), it is required by Section 1985(2) as well." 648 F.2d at 347. By likewise construing 42 U.S.C. § 1985(2) *in pari materia* with § 1985(3), this Court will avoid the pitfalls of creating a general federal tort law of conspiracy to obstruct justice, available only for federal court claims, under the first portion of § 1985(2).

If this Court takes *Griffin* to its logical conclusion and settles the matter by requiring all § 1985(2) plaintiffs to establish membership in some class defined by invidiously discriminatory criteria, Mr. Rutledge's § 1985(2) claim must fail. He can never satisfy such membership.

On the face of Mr. Rutledge's First Amended Complaint, he appeared as no more than a former ASU football player who failed to exercise his NCAA rights as applicable to ASU's athletic program. He did not succeed as an athlete at ASU, and left to attend another university after alleged disagreements with ASU football coaches and the ASU athletic director. Mr. Rutledge does not belong to a racial minority group; no class forms a basis for the alleged discrimination.

Nowhere have petitioners seen the suggestion that the 1871 Reconstruction Era Congress intended to protect white males of unknown political affiliation like Mr. Rutledge. Certainly playing football under a state university scholarship is not the type of right "secured

by the law to *all.*" *Griffin,* 403 U.S. at 10[illegible] (1971) (emphasis added). Accordingly, there is no "racial or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.*

While petitioners submit that the Eleventh Amendment bars the entire action against them, as presented in I above, Mr. Rutledge could in no event state a § 1985(2) claim against anyone.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari properly may be granted.

RESPECTFULLY SUBMITTED this 8th day of March, 1982.

GALLAGHER & KENNEDY

By _____

Michael L. Gallagher
Michael K. Kennedy
1585 The Arizona Bank Building
101 North First Avenue
Phoenix, Arizona 85003
Counsel for Petitioners

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
County of Maricopa)

Michael L. Gallagher, being first duly sworn upon his oath, deposes and says that he is a member of the Bar of this Court and one of the counsel of record for petitioners in this cause; that on this 8th day of March, 1982, he mailed three copies of petitioners' Petition for a Writ of Certiorari in this cause by depositing same in the United States mail, first-class postage prepaid, to:

Robert Ong Hing, Esq.
Stockton & Hing
234 N. Central Avenue
Suite 507
Phoenix, Arizona 85004

and that he also mailed forty copies of petitioners' Petition for a Writ of Certiorari to the Clerk of this Court, first-class postage prepaid; all in compliance with Supreme Court Rule 28.

Michael L. Gallagher

SUBSCRIBED AND SWORN to before me this 8th day of March, 1982.

Janice L. Simmons
Notary Public

My Commission Expires:
July 13, 1982

Appendix

Appendix A — United States District Court,
for the District of Arizona,
Memorandum and Order.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

KEVIN RUTLEDGE, *Plaintiff,* vs. ARIZONA BOARD OF REGENTS, ARIZONA STATE UNIVERSITY, FRANK KUSH, WILLIAM MASKILL, FRED L. MILLER and GARY HORTON, *Defendants.*	No. Civ. 79-778 Phx. WPC *MEMORANDUM AND ORDER* [Entered November 29, 1979]

In his first amended complaint, plaintiff Kevin Rutledge alleges that defendants are liable for harassment, intentional infliction of mental distress, assault and battery, defamation, breach of contract, interference with contractual rights, and negligence in failing to supervise and control employees. Plaintiff alleges further that these acts are deprivations of rights, privileges, and immunities under color of state law and, therefore, constitute a violation of 42 U.S.C. § 1983. Plaintiff's final count alleges that defendants Kush, Miller, and Horton have violated 42 U.S.C. § 1985 by conspiring to intimidate and threaten potential witnesses in order to prevent their testifying. All defendants have filed motions to dis-

miss or, in the alternative, to strike portions of the complaint.

Defendants argue that the Court lacks subject matter jurisdiction because a federal question is not presented under 42 U.S.C. § 1983 or § 1985 and there is no diversity of citizenship. Defendants are correct that plaintiff has failed to establish the requisite elements of a § 1985 action. That statutory remedy is available only where the tortious acts were inflicted upon a person because of his status as a member of an identifiable class. *E.g., Lopez v. Arrowhead Ranches,* 523 F.2d 924, 927 (9th Cir. 1975); *Weiss v. Patrick,* 453 F. Supp. 717, 724 (D R.I. 1978). Plaintiff has not shown or alleged that the claimed conspiracy to prevent enforcement of his right was in any way related to his membership in a class. Moreover, plaintiff's § 1985 claim consists of conclusory allegations of a conspiracy unsupported by specific facts. This type of pleading is insufficient to state a cause of action. Thus, plaintiff's § 1985 claim must be dismissed. *E.g., Place v. Shepherd,* 446 F.2d 1239, 1244 (6th Cir. 1971); *Powell v. Workmen's Compensation Board,* 327 F.2d 131, 137 (2d Cir. 1964).

Similarly, the acts alleged by plaintiff do not constitute deprivations of rights, privileges, and immunities within the meaning of 42 U.S.C. § 1983. The allegations forming the basis of plaintiff's § 1983 claim are mere common law torts, which do not constitute a federal cause of action even if committed under color of state law. *E.g., Sorenson v. Zapien,* 455 F. Supp. 1207, 1209 (D. Colo. 1978); *Taylor v. Nichols,* 409 F. Supp. 927, 933 (D. Kan. 1976).

The Court is vested with subject matter jurisdiction, however, on the basis of diversity of citizenship. Plaintiff has submitted an affidavit establishing his citizenship in the state of Nevada. At the time the action was commenced, plaintiff was registered to vote in Ne-

vada and held a Nevada driver's license. If plaintiff is unable to attain a career in professional football following the completion of his education, he intends to remain in Nevada and pursue a career in hotel management. Since defendants have not presented evidence controverting plaintiff's affidavit, plaintiff has satisfied his burden of establishing jurisdiction.

Defendants also argue that the Court is deprived of jurisdiction by the Eleventh Amendment to the United States Constitution. They contend that the present action is a suit against the State of Arizona because the named defendants are state agencies or state officials acting within the scope of their employment. It is clear that where the state is the real party in interest, suits by citizens of another state in federal court are barred by the eleventh amendment. *E.g., Edelman v. Jordan,* 415 U.S. 651, 662-63, 94 S.Ct. 1347, 1355 (1974). The eleventh amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI. To determine whether the state is the real party in interest, a number of factors must be considered. Among these factors are the source of payment in the event judgment is rendered in plaintiff's favor, the statutory scheme creating the agency in question, and the autonomy of the agency. *See Jagnandan v. Giles,* 538 F.2d 1166, 1173-76 (5th Cir. 1976); *Hutchison v. Lake Oswego School District No. 7,* 519 F.2d 961, 966 (9th Cir. 1975).

Generally, when a judgment must be paid from state funds, the state is the real party in interest and the suit is barred by the eleventh amendment. *Edelman v.*

Jordan, 415 U.S. 651, 663, 94 S.Ct. 1347, 1356 (1974); *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464, 65 S.Ct. 347, 350 (1945). The source of payment for a judgment against the Board of Regents was addressed in a recent Arizona Supreme Court decision, *Arizona Board of Regents v. Arizona York Refrigeration Co.*, 115 Ariz. 338, 565 P.2d 518 (1977). In that case, the court indicated that a judgment against the Board of Regents was the equivalent of a judgment against the state. *Id.* at 340, 565 P.2d at 520. Plaintiff in the present case argues that insurance policies insulate the Arizona Board of Regents and the state from liability. This argument was also addressed in *Arizona Board of Regents v. Arizona York Refrigeration Co.*, however, and the court stated that the existence of an insurance policy was irrelevant because the state would remain the primary obligor. *Id.* In addition, the procurement of liability insurance by the state does not change the character of the lawsuit; the suit is still an action against the state and the federal courts do not have jurisdiction to entertain such actions.

Analysis of the statutory scheme governing the Board of Regents also weighs in favor of a finding of eleventh amendment immunity. The Board of Regents consists of eight members appointed by the governor, and the governor and the state superintendent of public instruction serve as ex officio members. Ariz. Rev. Stat. Ann. § 15-721(A) (1972). The powers and duties of the Board of Regents are regulated by the state legislature. *Id.* at § 15-725. In addition, the Board of Regents is required to submit a detailed report to the governor after the close of each fiscal year. *Id.* at § 15-727. Under similar circumstances, other courts have concluded that a suit against the Board of Regents must be considered a suit against the state for eleventh amendment purposes. *Martin v. University of Louisville*, 541 F.2d 1171, 1174 (6th

Cir. 1976); *Jagnandan v. Giles*, 538 F.2d 1166, 1173-76 (5th Cir. 1976). The reasoning in those cases is sound and will be followed in the present action. Thus, the action against the Board of Regents must be dismissed.

The same reasoning is applicable to Arizona State University. It is an entity created by state statute, Ariz. Rev. Stat. Ann. § 15-702.01 (1958), and is governed by the Arizona Board of Regents. *Id.* at § 15-724. Moreover, the defendants argue that Arizona State University should be dismissed as a party to this action because the university is not a jural entity. They argue that the university operates through the Board of Regents pursuant to Ariz. Rev. Stat. Ann. § 15-721 et seq., and does not have independent status to sue or be sued in its own name. Plaintiff has not cited authority to the contrary. Thus, the suit against Arizona State University must be dismissed as well.

Count three of plaintiff's first amended complaint sets out the bases of defendant Miller's liability. Plaintiff asserts that as athletic director at Arizona State University defendant Miller is vicariously liable for the tortious conduct of defendants Kush and Maskill. In addition, defendant Miller is allegedly liable for employing and negligently supervising defendants Kush and Maskill. Clearly, plaintiff seeks to hold defendant Miller liable as an official of the state. In such cases, the eleventh amendment serves to bar the suit in federal court. *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 463-64, 65 S.Ct. 347, 350 (1945).

Defendants Kush and Maskill also may assert the eleventh amendment immunity to the extent the alleged conduct comes within the scope of their employment. All of the actions alleged by plaintiff occurred while defendants Kush and Maskill were acting in their capacity as football coaches. In addition, the alleged acts were committed in the interest of the Arizona State University

football program. There is nothing to suggest that the alleged conduct falls outside the scope of Kush's or Maskill's scope of employment. Therefore, the complaint must be dismissed with respect to these defendants also.

Plaintiff relies on *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908), and its progeny for the proposition that the wrongful acts of state officials deprive them of the eleventh amendment immunity. However, this line of cases deals with situations in which the state officials violated the constitutional rights of the plaintiff. As discussed previously, the present case involves alleged common law torts, not the enforcement of unconstitutional statutes or deprivations of federal rights under color of state law. Thus, the Court's jurisdiction cannot be sustained on this ground.

Since the plaintiff's complaint must be dismissed with respect to all defendants, it is unnecessary to reach the defendants' motion to strike.

IT IS ORDERED:

1. Defendants Arizona Board of Regents' and Arizona State University's motion to dismiss is granted, and the complaint and action are dismissed with respect to these defendants.

2. Defendants Fred L. Miller's and Gary Horton's motion to dismiss is granted, and the complaint and action are dismissed with respect to these defendants.

3. Defendants Frank Kush's and William Maskill's motion to dismiss is granted, and the complaint and action are dismissed with respect to these defendants.

4. The Clerk will enter judgment accordingly dismissing the complaint and action in its entirety as to all defendants.

DATED November 29, 1979.

/s/William P. Copple

United States
District Judge

Appendix B — United States Court of Appeals,
for the Ninth Circuit, Opinion.
[Caption Deleted].
Appeal from the United States District Court
for the District of Arizona.
Nos. 80-5005 and 80-5130.
Decided November 12, 1981.
AFFIRMED IN PART; REVERSED AND
REMANDED IN PART.

Before GOODWIN and SNEED, Circuit Judges, and HALBERT*, District Judge.

SNEED, Circuit Judge:

Appellant's first amended complaint and action were dismissed by the district court on the grounds, first, that the action was barred by the Eleventh Amendment and, second, that the complaint did not allege a violation of appellant's civil rights. Also, costs were taxed against appellant by the district court. Appellant appealed both the dismissal and the order with respect to costs. The appeals were consolidated.

We affirm the dismissal of the complaint and action as alleged in Count Four and a portion of Counts Three and Five. We reverse and remand with respect to Counts One and Two, a portion of Count Three and that portion of Count Five that alleges a claim under the first part (that portion preceding the semicolon) of 42 U.S.C. § 1985(2). We also reverse and remand the order taxing costs against the appellant.

Our jurisdiction rests on 28 U.S.C. § 1291.

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*Honorable Sherrill Halbert, Senior United States District Judge for the Eastern District of California, sitting by designation.

Appendix B-2

I.

THE FIRST AMENDED COMPLAINT

Appellant in his first amended complaint describes his success as a football player in high school and his recruitment by several colleges and universities, including Arizona State University (A.S.U.), acting through its football coach, the defendant, Frank Kush. Appellant chose to attend Arizona State University in the fall of 1977 on condition that he receive a football scholarship commencing the second semester of his first year. Appellant alleges that he performed successfully as a football player during the 1977 football season and that he obtained his athletic scholarship in the second semester of the 1977–78 academic year.

According to appellant's complaint, his troubles commenced shortly after the end of the 1977 football season when he received injuries to his face and chest as the result of an automobile accident. A chest infection resulted which impaired his ability to perform during the spring football practice and the fall training camp. Appellant was demoted from first string defensive back to the last string by the time the training camp closed, although he remained the starting punter.

Appellant signed a scholarship contract in the fall of 1978 and thereafter requested that he be permitted to sit out the 1978 season but to continue to practice with the team, a status known as "red-shirting." Appellant alleges appellee Kush consented to "red-shirt" him during the 1978 season. Appellant watched the opening game of the season from the stands, but during the following week's practice he was told by appellee Maskill that he had not been "red-shirted" and Kush called him a liar for saying that he had been. Thereafter appellant was considered by Kush as a full member of the squad. Appellant alleges that he continued to be underweight and weak as

a result of the chest infection and that neither Kush nor Maskill attempted to determine the cause of his condition.

On October 28, 1978, during the University of Washington game and after what Kush thought was a poor punt, appellant alleges that Kush took appellant's helmeted head between his two hands, shook his head from side to side, yelled obscenities at him, and then struck him with a fist in the mouth. Thereafter, Kush held appellant up to public ridicule and did not permit appellant to punt in a game for the rest of the season. Kush, appellant also alleges, recruited and offered a full scholarship to a new punter.

Appellant rid himself of his infection during early 1979 and immediately his weight and strength improved. Upon reporting to spring training, however, he was told by Maskill that he should quit the team and transfer to another school. Also, he was not permitted to scrimmage or play in exhibition games. Kush and Maskill employed scorn and ridicule in an attempt to get appellant to quit the team and transfer to another school, thereby forsaking his scholarship. The appellees "refused to consent to plaintiff's [appellant's] transfer, making plaintiff ineligible for financial aid [by the transferee school] for one year under NCAA rules." First Amended Complaint, ¶ 28. These rules also provide that "institutional aid may not be gradated or canceled (sic) during the period of its award on the basis of (i) a student-athlete's ability or his contribution to a team's success, (ii) because of an injury which prevents the recipient from participating in athletics or (iii) for any other athletic reason." First Amended Complaint ¶ 27. In addition, under the Constitution and By-Laws of the National Collegiate Athletic Association (NCAA) "plaintiff, once having been granted an athletic scholarship at ASU could have that scholarship revoked only for good cause, and only after a proper hearing, if so requested."

Appellant alleges he was "forced to leave A.S.U." and "transfer to the University of Nevada at Las Vegas, without a scholarship." *Id.* at ¶ 28. This required appellant to be red-shirted without a scholarship his first year at Nevada and to extend his stay in school by a semester in order to complete his football eligibility.

The complaint, after reciting the above allegations, contains five counts. Count One charges Kush with all the allegations applicable to him and asserts that Kush conspired with his assistant coaches, including Maskill, to deprive appellant of his scholarship and his rights to a hearing under NCAA rules by means of "a pattern of harassment, embarrassment, defamation, and intentional infliction of mental distress" in order to obtain the opportunity to give appellant's scholarship to another. This deprived appellant of an advantageous business and educational relationship with A.S.U. Appellant alleged actual damages in the amount of $100,000, and also requested an award of punitive damages.

Count Two was directed at Maskill. It charged him with conspiring with Kush to induce appellant to give up his scholarship and transfer to another school.

Count Three incorporates all the preceding allegations and is directed at the Board of Regents of Arizona State University and athletic director Fred L. Miller, who, it is alleged, are vicariously liable for the acts of Kush and Maskill and also are liable because of their failure to supervise Kush and Maskill adequately. A prayer for compensatory damages is included in the count.

Count Four, after incorporating all the foregoing, alleges that Kush and Maskill acted under color of state law and deprived appellant of rights, privileges, and immunities under the Constitution and thereby are in violation of 42 U.S.C. § 1983. The count contains prayers

for compensatory and punitive damages, attorney's fees, costs, and interest on the judgment until paid.

Count Five, again incorporating all preceding allegations, charges Kush, Miller, and one Horton, another A.S.U. assistant football coach, of conspiring to obstruct justice by intimidating material witnesses and encouraging others to deter appellant from enforcing his legal rights. In this manner, appellant, it is alleged, was deprived of equal protection of the laws and of his privileges and immunities in violation of 42 U.S.C. § 1983 and § 1985(2).

Jurisdiction in the district court was alleged to be based on diversity of citizenship, 28 U.S.C. § 1332, the deprivation of civil rights, 28 U.S.C. § 1343, and the existence of a federal question, 28 U.S.C. § 1331. The required jurisdictional amount was properly alleged.

We shall consider initially the scope of the bar of the Eleventh Amendment as it relates to each of the counts of the complaint. Thereafter, we shall consider briefly the manner in which the appellant's claim based on Arizona law, jurisdiction with respect to which is based on diversity of citizenship, may be affected by the principles of res judicata and collateral estoppel. Finally, we shall consider the appellant's civil rights allegations.

II.

ELEVENTH AMENDMENT IMMUNITY

The district court held that the appellant had established diversity jurisdiction in that at the time the action was commenced appellant was a citizen of Nevada while the appellees were citizens of Arizona. We affirm that holding.

The appellees contend, however, that the Eleventh Amendment deprived the district court of jurisdiction

with respect to each count of the appellant's first amended complaint. The district court agreed with this contention. We hold that the immunity of the Eleventh Amendment extends only to the Arizona Board of Regents and Arizona State University. We also hold that appellee Miller is entitled to partial immunity. Appellees Kush, Maskill, and Horton, on the other hand, are not entitled to assert to any extent the immunity of the Eleventh Amendment to deprive the district court of jurisdiction.

Our analysis commences with *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), and *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). The latter held that an effort by a state official to enforce an alleged unconstitutional state statute could be enjoined notwithstanding the Eleventh Amendment. Under these circumstances the state official acts not on behalf of the state but as an individual. 209 U.S. at 159–60, 28 S.Ct. at 453–454. The former held that when the liability sought to be imposed must be paid from public funds in the state treasury the Eleventh Amendment is a bar to enforcement. 415 U.S. at 663, 94 S.Ct. at 1355. Thus, a suit seeking a refund of taxes paid to a state encounters the Eleventh Amendment bar even when nominally against state officials, *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945), while a suit against a state official for acts wrongful under general law does not encounter this bar. *See Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 642–43, 31 S.Ct. 654, 656, 55 L.Ed. 890 (1911); *New England Patriots Football Club, Inc. v. University of Colorado*, 592 F.2d 1196, 1201 (1st Cir. 1979).

Obviously the source from which the sums sought by the plaintiff must come is the most important single factor in determining whether the Eleventh Amendment bars federal jurisdiction. *See Edelman v. Jordan*, 415 U.S. at 668, 94 S.Ct. at 1358; *Hutchison v. Lake Oswego School*

District No. 7, 519 F.2d 961, 966 (9th Cir. 1975). Other significant factors include whether the defendant entity performs an essential government function and the manner in which the entity is regarded by the law of the relevant state. *See* 519 F.2d at 966–68. Whether state law treats the entity as the state, permits it to sue and be sued, permits it to take property in its own name, or permits it to conduct itself substantially independently of the state are relevant aspects of the state law that must be considered.

The district court properly applied these factors in reaching the conclusion that this suit against the Arizona Board of Regents and Arizona State University was not cognizable in a federal court. The Arizona Board of Regents is treated as the State of Arizona under Arizona law. *See Arizona Board of Regents v. Arizona York Refrigeration Co.*, 115 Ariz. 338, 565 P.2d 518 (1977). Its funds are state funds. The fact that such funds may have been derived from insurance proceeds does not alter this conclusion. *Markowitz v. United States*, 650 F.2d 205 (9th Cir. 1981); *Arizona Board of Regents v. Arizona York Refrigeration Co.*, 115 Ariz. 338, 565 P.2d 518 (1977).

In support of its holding the district court observed as follows:

> Analysis of the statutory scheme governing the Board of Regents also weighs in favor of a finding of eleventh amendment immunity. The Board of Regents consists of eight members appointed by the governor, and the governor and the state superintendent of public instruction serve as ex officio members. Ariz.Rev.Stat. Ann. § 15-721(A) (1972). The powers and duties of the Board of Regents are regulated by the state legislature. *Id.* at § 15-725. In addition, the Board of Regents is required to submit a detailed report to the governor after the close of each fiscal year. *Id.* at § 15-727. Under similar circumstances, other courts have concluded that

> a suit against the Board of Regents must be considered a suit against the state for eleventh amendment purposes. *Martin v. University of Louisville,* 541 F.2d 1171, 1174 (6th Cir. 1976); *Jagnandan v. Giles,* 538 F.2d 1166, 1173–76 (5th Cir. 1976). The reasoning in those cases is sound and will be followed in the present action. Thus, the action against the Board of Regents must be dismissed.

We find these observations persuasive.

The position of Arizona State University is not materially different for Eleventh Amendment purposes. Although it is contended that it is an activity carried on by the Arizona Board of Regents and thus not a jural entity, our holding would not be otherwise even if this were true. Its funds would be state funds from which the damages appellant seeks must be paid.

The position of appellees Miller, Kush, Maskill, and Horton is different, however. Count Three charged Miller with vicarious liability for the acts of Kush and Maskill. Such liability, if established, would rest solely upon his position as an official of Arizona State University. To that extent the appellant's suit is against the University and the Board of Regents, which, as we have held, is a suit against the state for Eleventh Amendment purposes. *Cf. Stone v. Arizona Highway Commission,* 93 Ariz. 384, 393–94, 381 P.2d 107, 113 (1963) (state employee not personally liable under doctrine of respondeat superior). The fact that Miller is the nominal defendant in this aspect of the plaintiff's case does not preclude the operation of the Eleventh Amendment's bar. *See Ford Motor Co. v. Department of Treasury,* 323 U.S. at 464, 65 S.Ct. at 350.

Miller, however, is also charged in Count Three with a failure to supervise Kush and Maskill adequately. This amounts to an allegation under general law of wrongful failure to act by a state official. *Cf. Stone v.*

Arizona Highway Commission, 93 Ariz. at 394, 381 P.2d at 113–14 (state officials may be held liable for their own acts of misfeasance). As to such allegations the Eleventh Amendment bar is inapplicable. *See Hopkins v. Clemson Agricultural College*, 221 U.S. at 642–43, 31 S.Ct. at 656; *New England Patriots Football Club, Inc. v. University of Colorado*, 592 F.2d at 1201. Neither the district court nor Miller have pointed to any law of the State of Arizona that would require that any damages, for which Miller would be liable for his failure to supervise Kush and Maskill properly, be paid from state funds. The mere fact that his wrongs occurred in the scope of his employment, in the sense that term is generally used in agency law, does not require the conclusion that the suit in this respect is against the state. It is true, of course, that by reason of the acts of Miller, the appellant under Arizona law may have a claim in state court against the State of Arizona. *See* Ariz.Rev.Stat. § 12-821 to 826. The fact that such a claim may exist does not invoke the Eleventh Amendment's bar. Nor does Ariz.Rev.Stat. § 41-621(A)(3) have that effect. It does no more than authorize the acquisition of liability insurance on behalf of the state, its agencies, and its employees.

Our reasoning is equally applicable to Kush and Maskill. The district court extended the Eleventh Amendment bar to these appellees on the ground that "the alleged acts were committed in the interest of the Arizona State University football program" and that nothing suggests that "the alleged conduct falls outside the scope of Kush's or Maskill's scope of employment." This is not a sufficient ground to invoke the Amendment's bar. That bar is not automatically applicable to a suit brought against a state official in his individual capacity alleging the commission by him of a common law tort in the course of his employment. *Johnson v. Lankford*, 245 U.S. 541, 38 S.Ct. 203, 62 L.Ed. 460 (1918). Federal ju-

risdiction, of course, must be etablished, but that is no problem in this case because of the existence of diversity jurisdiction.

III.

COLLATERAL ESTOPPEL AND RES JUDICATA

It follows that the appellant's claims against Miller, Kush and Maskill are not entirely barred by the Eleventh Amendment. Inasmuch as appellant has established jurisdiction based on diversity with respect to these defendants, it is necessary to reverse and remand to permit the appellant to proceed to trial on such claims based on Arizona law as are appropriate. These would include proceedings based on the general tort law of Arizona.

It is likely, however, that some or all of appellant's claims will be barred by the doctrines of res judicata and collateral estoppel. Proceedings in the state court have occurred with results to date adverse to appellant. Although the complete record of those proceedings is not a part of the record in this case, we have been informed that the state court eschewed consideration of the constitutional claims on the ground that the district court's order dismissing those claims was res judicata. The fact that these issues were not considered in the state court does not prevent its judgment from having res judicata effect in the federal forum. When a party seeks relief in state court for an alleged wrong, he is thereafter barred from seeking relief on constitutional grounds "from the same defendant, for the same wrong, in federal court." *Gallagher v. Frye*, 631 F.2d 127, 128–29 (9th Cir. 1980); *Scoggin v. Schrunk*, 522 F.2d 436, 437 (9th Cir. 1975), *cert. denied*, 423 U.S. 1066, 96 S.Ct. 807, 46 L.Ed.2d 657 (1977). It is therefore clear that the state court judgment denying relief on tort theories will operate to preclude consideration of the same facts on constitutional grounds.

Since we have not been provided with the state court record, we must leave it to the district court to fix the precise extent to which res judicata and collateral estoppel will bar appellant from seeking relief in this action. We can only make clear that none of our holdings are intended to bar the proper application of collateral estoppel and res judicata on remand of this case. This includes our holdings with respect to appellant's civil rights allegations. *See Allen v. McCurry*, ___ U.S. ___, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980) (application of collateral estoppel in suits based on 42 U.S.C. § 1983). We now turn to those allegations. In doing so we repeat that the claims alleged against Kush, Maskill, Miller, and Horton in Counts Four and Five are not barred by the Eleventh Amendment.

IV.

THE CIVIL RIGHTS ALLEGATIONS

Counts IV and V allege that Kush, Maskill, Miller, and Horton have engaged in acts under the color of state law that amounted to a deprivation of appellant's rights, privileges, or immunities secured by the Constitution within the meaning of 42 U.S.C. §§ 1983 and 1985(2). Because Counts IV and V incorporate all the allegations of the preceding counts, one must survey the entire complaint to determine precisely the actions that the appellant contends constitute such deprivations.

This turns out to be more simple than one might have anticipated. Count Two is directed at Maskill, and whether it states a claim turns entirely on whether Count One states a claim against Kush. Therefore, the analysis of Count One is equally applicable to Count Two. Count Three, on the other hand, fails to state a claim against the Arizona Board of Regents and Arizona State University because of the Eleventh Amendment. No further dis-

cussion of that portion of Count Three is necessary. Insofar as Count Three under our discussion in Part II of this opinion may state a claim against Miller not barred by the Eleventh Amendment, the validity of that claim initially turns on whether Count One states a claim against Kush. The failure of Count One to state a claim against Kush would completely exonerate Miller.

Because of these relationships between Counts One, Two, and Three, our discussion of the first of the two civil rights counts, Count Four, which alleges a claim embraced within 42 U.S.C. § 1983, can be focused entirely on the complaint's Count One.

A. *Count Four*

A careful analysis of Count One reveals that the following actions of Kush are alleged to amount to deprivations actionable in federal court by reason of 42 U.S.C. § 1983:

1. Assault and battery;
2. Demotion of appellant from the position held during the 1977 season;
3. Harassment, embarrassment, and defamation;
4. Deprivation without a hearing of appellant's scholarship and his business and educational relationship with Arizona State University.

We shall consider each of these allegations. All concede that all relevant actions by the appellees were under color of state law.

1. Assault and Battery.

This court has held that an allegation of "an unprovoked assault and battery by a guard upon a prisoner known by the guard to be suffering from an attack of

emphysema, by striking him in the solar plexus hard enough that the 'attack rendered the patient plaintiff totally handicapped' " states a claim under 42 U.S.C § 1983. *Meredith v. State of Arizona,* 523 F.2d 484 (9th Cir. 1975); *see Gregory v. Thompson,* 500 F.2d 59 (9th Cir. 1974). We left open the question whether less reprehensible conduct would suffice to state a claim. 523 F.2d at 484.

We need not pursue this issue, however, because we believe the teaching of *Parratt v. Taylor,* ___ U.S. ___, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), provides the guidance we must accept. Under that decision we may assume, without deciding, that the alleged assault and battery deprived the appellant of "liberty" within the meaning of the Fourteenth Amendment and focus our attention on whether this was done "without due process of law." *Id.* at 1914. Obviously the assumed deprivation was not, nor could it have been, accompanied by a predeprivation hearing. That being so, the issue is whether the postdeprivation hearing available to the appellant under the law of the State of Arizona satisfies the due process requirement of the Fourteenth Amendment.

We hold that it does. The Supreme Court in *Parratt v. Taylor* indicated that when no practical way to provide a predeprivation hearing exists, a postdeprivation hearing provided at a "meaningful time and in a meaningful manner" will suffice. *Id.* at 1915. The issue becomes merely whether the remedies available under Arizona law and in the Arizona courts constitute the postdeprivation hearing required by the Fourteenth Amendment. As already mentioned, counsel have informed us that certain proceedings growing out of the incidents related by the complaint before us already have taken place. This indicates not only the existence of postdeprivation remedies under Arizona law, but also that appellant has pursued those remedies. Thus, our task is made less difficult

than that of the *Parratt* Court, which relied on the mere existence of state tort procedures to find that due process concerns had been met, despite the plaintiff's failure to take advantage of those procedures. In the instant case, since appellant has sought redress in the Arizona state courts, and in the absence of suggestion that the post-deprivation procedures under state law are deficient, we must conclude that the alleged deprivation was not without due process of law. That the effect of our holding is to relegate appellant to his tort law remedy under Arizona law for Kush's alleged assault and battery should surprise no one. That is the consequence of *Parratt v. Taylor* as applied to this action of Kush.

2. Demotion of Appellant.

As already indicated, to state a claim under 42 U.S.C. § 1983, it is necessary that there be a deprivation of a right, privilege, or immunity "secured by the Constitution and laws." Appellant enjoyed no right under the constitution nor under the laws of Arizona to maintain his position as either a first or second string defensive back or as the first string punter. In demoting him, Kush, acting we will assume under color of state law, deprived him of neither "liberty" nor "property." *See Walsh v. Louisiana High School Athletic Ass'n,* 616 F.2d 152, 159–60 (5th Cir. 1980), *cert. denied,* ___ U.S. ___, 101 S.Ct. 939, 67 L.Ed.2d 109 (1981); *Albach v. Odle,* 531 F.2d 983 (10th Cir. 1976) (per curiam); *Parish v. NCAA,* 506 F.2d 1028, 1034 (5th Cir. 1975); *cf. Rivas Tenorio v. Liga Athletica Interuniversitaria,* 554 F.2d 492, 497 (1st Cir. 1977) (participation in intercollegiate athletics not a fundamental right for equal protection analysis). Appellant had no legal guarantee of uninterrupted enjoyment of the status he occupied during the 1977 season. *See Paul v. Davis,* 424 U.S. 693, 702–12, 96 S.Ct. 1155, 1160–1166, 47 L.Ed.2d 405 (1976). Neither was the demotion a "grievous

loss" within the meaning of that phrase when employed for purposes of fixing the substantive content of actions cognizable under 42 U.S.C. § 1983. *See Goss v. Lopez*, 419 U.S. 565, 588, 95 S.Ct. 729, 743, 42 L.Ed.2d 725 (1975) (Justice Powell, dissenting).

3. Harassment, Embarrassment and Defamation.

Appellant's allegations of harassment, embarrassment, and defamation by Kush also fail to state a claim cognizable under 42 U.S.C. § 1983. This result is compelled by *Paul v. Davis*, 424 U.S. at 701–10, 96 S.Ct. at 1160–1164. Even if, as appellant impliedly alleges, Kush went beyond the usual verbal lashings common to football practice fields his transgressions constitute nothing more than a tort "which the state may protect against injury by virtue of its tort law." *Id.* at 712, 96 S.Ct. at 1165.

4. Deprivation of Appellant's Scholarship and Relationship with Arizona State University.

Appellant's complaint makes abundantly clear that, while Kush wanted appellant to get off the team and surrender his scholarship, appellant desired either to "red shirt" or to transfer to another school without suffering the suspension of his eligibility for financial aid for one year as required by the NCAA rules. Kush refused to accede to either request. This refusal does not amount to a deprivation of an interest in "liberty" or "property" under the authorities previously cited. Appellant had no right guaranteed by state law to enjoy either alternative.

Appellant did enjoy a right against cancellation or "gradation" of his scholarship "during the period of its award" for "athletic reasons" and against revocation except "for good cause, and only after a proper hearing, if so requested." *See* p. 5594, *supra*. We will assume, without

deciding, that these NCAA rules created an interest in "property" within the meaning of the Fourteenth Amendment. Our difficulty is that the appellant has failed to allege a "deprivation" of these rights. His allegations do not even reveal the "period of the scholarship award" or that he requested a hearing pursuant to NCAA rules. Nor does appellant explain how his scholarship or NCAA rules created a *right* to be red-shirted or to transfer without loss of eligibility under these circumstances. Furthermore, the issue of Kush's consent to a restriction-free transfer arose, indeed only could arise, when appellant sought to surrender his scholarship and continue his football career without interruption and with immediately available scholarship aid at a school other than Arizona State University. Kush's failure to assist him in this endeavor could in no way have infringed the appellant's continued enjoyment of scholarship rights at Arizona State University. Kush's refusal deprived appellant of no interest in "property" within the meaning of the Fourteenth Amendment. The interest in "property" we have assumed *arguendo* that appellant possessed was not that of which appellant asserts he was deprived.

We, therefore, conclude that Count Four has failed to state a claim cognizable under 42 U.S.C. § 1983.

B. *Count Five*

The final count of appellant's complaint, which we set out fully in the margin,[1] purports to allege claims

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[1]Count Five of the complaint reads as follows:

COUNT FIVE
RUTLEDGE v. KUSH, MILLER and HORTON

55. Paragraphs 1 through 54 are incorporated herein by reference as if more fully set forth at length.

[*Footnote Continued*]

under both sections 1983 and 1985(2). The gist of the

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56. On information and belief, since the time of filing the statutorily mandated claim with the Arizona Board of Regents, defendants Kush, Miller and Horton have conspired to prevent, by intimidation and threat, various material witnesses from freely, fully and truthfully testifying as to matters raised in the within complaint.

57. On information and belief, since the time of filing the statutorily mandated claim with the Arizona Board of Regents, defendants Kush, Miller and Horton have conspired for the purpose of hindering or obstructing the due course of justice with an intent to deny the plaintiff equal protection of the laws by threatening and intimidating potential material witnesses, to prevent the plaintiff from lawfully enforcing his rights and to "cover up" the wrongful acts of defendants Kush and Maskill.

58. Since the filing of plaintiff's claim with the Arizona Board of Regents, defendants Kush and Miller have willfully and maliciously published and disseminated false and inflammatory statements regarding the plaintiff for the purpose of inciting "fans" of Kush to intimidate plaintiff and plaintiff's family in order to deter and discourage plaintiff from enforcing his legal right to pursue claims against the defendants for the actions described herein.

59. The acts of defendants Kush, Miller and Horton as described above did constitute a conspiracy to deny the plaintiff equal protection of the laws and equal privileges and immunities under the laws. The acts of defendants Kush, Miller and Horton were intended to so deprive the plaintiff of his equal privileges and immunities under the laws and have and will result in injury to the plaintiff.

60. The aforementioned acts of defendants Kush, Miller and Horton constitute violations of 42 U.S.C. § 1983 and 42 U.S.C. § 1985(2).

61. As a result of the aforementioned conduct of Kush, Miller and Horton the plaintiff has and will suffer damages in an as yet undetermined amount.

62. The aforementioned conduct of defendants Kush, Miller and Horton was willful and deliberate and warrants the award of punitive damages in an amount of One Million Dollars ($1,000,000.00).

WHEREFORE, Kevin Rutledge prays:

A. That the Court temporarily restrain and permanently enjoy [sic] defendants Kush, Miller and Horton from any further violations of 42 U.S.C. § 1985.

[*Footnote Continued*]

complaint is that Kush, Miller, and Horton have conspired to intimidate witnesses to prevent such "witnesses from freely, fully and truthfully testifying as to matters raised in the within complaint."

The district court held this count failed because appellant did not allege that the conspiracy was in any way related to his membership in a class and because the count was too conclusory to state a valid claim. We hold that the district court erred in holding by implication that the first portion of section 1985(2), which is set forth in the margin,[2] is applicable only when the intimidation is related to invidious discrimination against a class. We also hold that appellant has sufficiently alleged a claim under the first portion of section 1985(2).

We recognize that the first of these holdings places us alongside the District of Columbia Circuit and the Third Circuit and in opposition to the Fifth and Eighth

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B. For Judgment against Frank Kush, Fred L. Miller and Gary Horton for:

1. Actual damages in an amount to be determined.
2. Punitive or exemplary damages in an amount in excess of One Million Dollars ($1,000,000.00).
3. Reasonable attorneys fees.
4. Costs incurred herein.
5. Interest on the amount of judgment at the lawful rate from the date of same until paid.

[2]That portion reads as follows:

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror;

Circuits.[3] Like the District of Columbia and Third Circuits, we are guided by the plain language of the first part of section 1985(2) and the legislative history which indicates clearly that the constitutional concerns that led to restricting the second part of section 1985(2) to deprivations of equal protection of the laws were not applicable to that section's first part. That part was designed to protect the federal government's interest in its own courts. No constituional doubt with respect to the power of the federal government to protect that interest existed in 1871 nor does any exist today. To require that a class-based discriminatory intent be shown to establish a cause of action under the first part of section 1985(2) would attribute to Congress in 1871 a constitutional concern that did not exist. *See McCord v. Bailey,* 636 F.2d 606, 616 (D.C.Cir.1980).

The teaching of *Griffin v. Breckenridge,* 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971), is not to the contrary. There the Court sought to interpret section 1985(3) in a manner that was responsive to the desire of Congress to avoid the inescapable constitutional issue that would have attended enactment of a general federal tort law. This was accomplished by limiting the scope of that subsection to those private conspiracies behind which lie some racial or class-based invidiously discriminatory animus. *Id.* at 102, 91 S.Ct. at 1798. Part one of section 1985(2) requires no such limitation because it is limited by its terms to private conspiracies designed to

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[3]*See McCord v. Bailey,* 636 F.2d 606, 614–17 (D.C.Cir. 1980); *Brawer v. Horowitz,* 535 F.2d 830, 840 (3d Cir. 1976) (class-based invidious discrimination not required under first part of section 1985(2)). *But see Kimble v. McDuffy,* 648 F.2d 340, 346–48 (5th Cir. 1981) (en banc); *Jones v. United States,* 536 F.2d 269, 271 (8th Cir. 1976) (class-based animus not [sic] required under first part of section 1985(2)).

obstruct certain processes of "any court of the United States." This provision has within it no seeds from which could spring a general federal tort law.

The same cannot be said with confidence about the second part of section 1985(2) which is concerned with private conspiracies to defeat the course of justice in state courts "with the intent to deny to any citizen the equal protection of the laws." To require a racial or class-based invidiously discriminatory animus behind the private conspiracy involving this part of section 1985(2) is entirely proper. This court has so held. *See Phillips v. Bridge Workers Local 118,* 556 F.2d 939, 940–41 (9th Cir. 1977). No case in this circuit has been brought to our attention, nor have we been able to discover any, that imposed a similar requirement with respect to the first part.

Whether appellant has adequately alleged a claim under the first part of section 1985(2) is a close question. Certainly he has failed to allege a proper claim under its second part because, although the allegations of Count Five set forth a private conspiracy designed to obstruct the due course of justice at the state level, there exists no sufficient allegation of racial or class-based invidiously discriminatory animus. However, we conclude that appellant's Count Five sufficiently alleges a claim under part one of section 1985(2) to escape a motion to dismiss. We are influenced in reaching this decision by the fact that the proper scope of part one of section 1985(2) previously has been uncertain and that the relationship between the parts of section 1985(2) has been obscure to some extent. On remand the district court may wish to require the appellant to amend Count Five to make more particular his allegations under part one of section 1985(2) and to eliminate those allegations pertaining to the second part of that section. Nothing in this opinion should be construed to prevent this course of action.

In view of these findings it is not necessary to address Count Five's allegation that Kush, Miller, and Horton violated section 1983 as well.

V.

TAXATION OF COSTS

The appeal from the taxation of costs against the appellant presents a difficult question. Appellees Arizona Board of Regents and Arizona State University have prevailed. Appellees Miller, Kush, Maskill, and Horton have prevailed only in part to this point in the proceedings. It strikes us that the proper course for this court to take is to reverse the district court's taxation of costs in its entirety and to remand to the district court to reconsider the taxation of costs in the light of this opinion and such further proceedings in this case as might occur. In reversing and remanding it should be understood that we intend to express no opinion regarding the propriety of the taxation of individual items of cost incurred by individual or institutional appellees. Our reversal rests solely on the ground that taxation of costs against the appellant at this stage of the proceedings is premature.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEVIN RUTLEDGE, *Plaintiff-Appellant,*	)	No. 80-5005
	)	*ORDER*
v.	)	
	)	[Entered
ARIZONA BOARD OF REGENTS, et al., *Defendants-Appellees.*	)	December 8, 1981]

Before: GOODWIN and SNEED, Circuit Judges, and HALBERT,* District Judge

Appellee Miller's petition for rehearing is denied.

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*Honorable Sherrill Halbert, Senior United States District Judge for the Eastern District of California, sitting by designation.

Appendix D — Constitutional Provisions and Statutes Involved.

1. United States Constitution, Article III, Sections 1 and 2:

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

2. United States Constitution, Amendment XI:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

3. 42 U.S.C. § 1985:

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand

or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

4. Ariz. Rev. Stat. Ann. § 12-821:

Authorization of claim against state on tort or contract claim

Persons having claims on contract or for negligence against the state, which have been disallowed, may on the terms and conditions set forth in this article, bring action thereon against the state and prosecute the action to final judgment.

5. Ariz. Rev. Stat. Ann. § 41-621:

Purchase of insurance; coverage; limitations; exclusions

A. The department of administration shall obtain insurance against loss, to the extent it is determined necessary and in the best interests of the state as provided in subsection C of this section, on the following:

1. All state owned buildings, including those of the universities, but excluding buildings of community colleges, whether financed in whole or in part by state monies.

2. Contents in any buildings owned, leased or rented, in whole or in part, by or to the state.

3. The state and its departments, agencies, boards and commissions and all officers, agents and employees thereof, against liability for acts or omissions of any nature while acting in authorized governmental or proprietary capacities and in the course and scope of employment or authorization except as prescribed by this chapter.

4. All personal property, including vehicles owned by the state and its departments, agencies, boards and commissions.

5. The state and its departments, agencies, boards and commissions against casualty and liability losses of every nature except as prescribed by this chapter.

B. The department of administration may determine, in the best interests of the state, that state self-insurance is necessary or desirable and, if that decision is made, shall provide for state self-insurance for losses arising out of state property or liability claims prescribed by subsection A of this section and for injury, sickness, disease or death resulting from health care and claimed against a state operated health facility or any person employed by the state or in training within a state operated or approved health facility and while acting in such capacity. If the department of administration provides state self-insurance, the insurance coverage shall be secondary coverage for any loss which is covered by insurance. The department of administration shall pay for claims processing costs, including adjusting costs, legal defense costs and attorneys' fees for any portion of claims falling within state self-insurance coverage pursuant to provisions of this chapter.

C. In carrying out the provisions of this chapter, the department of administration shall establish a risk management section to provide the state with some or all of the necessary risk management services, or shall contract for risk management services and shall purchase such insurance coverage, pursuant to the provisions of § 41-730, as the director of the department of administration deems necessary in the best interest of the state after consultation with the risk manager, and may, in addition to other specifications of such coverage as deemed necessary, determine self-insurance to be established.

D. No successful bidder for risk management services pursuant to this section shall be entitled to receive directly or indirectly any sales commission, contingent

commission, excess profit commission, or other commissions, or anything of value, as payment for the risk management services except those amounts received directly from this state as payment for the risk management services.

E. The department of administration shall pay risk management fees and premiums for insurance on state property and state liability pursuant to provisions of this chapter and subject to legislative appropriations.

F. A state officer, agent or employee acting in good faith, without wanton disregard of his statutory duties and under the authority of an enactment that is subsequently declared to be unconstitutional, invalid or inapplicable, is not personally liable for an injury or damage caused thereby except to the extent that he would have been personally liable had the enactment been constitutional, valid and applicable.

G. A state officer, agent or employee, except as otherwise provided by statute, is not personally liable for an injury or damage resulting from his act or omission in a public official capacity where the act or omission was the result of the exercise of the discretion vested in him if the exercise of the discretion was done in good faith without wanton disregard of his statutory duties.

H. The state and its departments, agencies, boards and commissions are immune from liability for losses arising out of a judgment for willful and wanton conduct resulting in punitive or exemplary damages.

I. The following exclusions shall apply to subsections A and B of this section:

1. Losses that arise out of and are directly attributable to an act or omission determined by a court, to be a criminal felony by a state officer, agent or employee unless the state knew of the person's propensity for that

action, except those acts arising out of the operation or use of a motor vehicle.

2. Losses arising out of contractual breaches.

J. If self-insurance coverage is determined to exist, the attorney general, with funds provided by the department of administration in accordance with subsection B of this section shall provide for the defense, either through his office or by appointment of outside legal counsel, of the state and its departments, agencies, boards and commissions and all officers, agents and employees thereof for or on account of their acts or omissions covered pursuant to this chapter. All state departments, agencies, boards and commissions and all officers, agents and employees thereof shall cooperate fully with the attorney general and department of administration risk management division in the defense of claims arising pursuant to this chapter.

K. A claim for liability damages made pursuant to this chapter may be settled and payment made up to the amount of twenty-five thousand dollars with the approval of the head of the risk management division and the attorney general. Any claim over the amount of twenty-five thousand dollars may be settled and payment made with the approval of the head of the risk management division, the attorney general and the joint legislative budget committee.

L. Neither the authority provided by this section to insure, nor the exercise of such authority, shall:

1. Impose any liability on this state or the departments, agencies, boards and commissions or any officers, agents and employees of this state unless such liability otherwise exists.

2. Impair any defense this state or the departments, agencies, boards and commissions or any officers, agents and employees of this state otherwise may have.

M. The department of administration shall promulgate such rules and regulations as are deemed necessary to carry out and implement the provisions of this chapter.

6. Ariz. Rev. Stat. Ann. § 41-622:

Revolving funds for uninsured losses; risk management administrative fund

A. There is established a permanent liability loss revolving fund in the department of administration for the purchase of insurance and payment of self-insured liability losses pursuant to § 41-621, subsections A and B.

B. There is established a revolving property loss fund in the department of administration for the purpose of purchasing insurance and payment of self-insured property losses for replacing or rebuilding state property as provided in § 41-621, subsection A, but excluding any loss from obsolescence, nonserviceability or mysterious disappearance. The director of the department of administration, subject to § 41-730, may disburse monies to contractors who rebuild state property as a result of self-insured losses or to persons who supply goods or services in replacing self-insured losses.

C. There is established a risk management administration fund in the department of administration for the payment of all administrative costs determined necessary by the department of administration to carry out risk management section services prescribed by § 41-621.

D. The department of administration shall present to the legislature at the beginning of each session a budget request based on the projected needs for the following fiscal year for the revolving liability loss, revolving property loss and risk management administra-

tion funds. The budget request shall be broken down to reflect the amount of monies to be charged against each of the state departments, agencies, boards and commissions. Any state department, agency, board or commission that has an amount for insurance included in its appropriation, whether specifically stated or not, and any state department, agency, board or commission that receives funds other than those appropriated shall be billed for the proportionate share of the charges for insurance by the department of administration. All monies received from such billings shall be deposited to the funds as identified in subsections A, B and C of this section as directed by the chairman and vice-chairman of the joint legislative budget committee.

E. All monies recovered by the state pursuant to litigation, recovery, salvage value of damaged property, proportionate share monies from any other existing state funds, or otherwise, for damages relating to either a liability or property loss for which monies from the revolving liability or property loss funds have been paid shall be deposited in the respective revolving fund.

F. The monies in the revolving liability loss and property loss fund may be invested pursuant to § 35-324. Interest earnings on the revolving liability loss and property loss funds shall be credited to the respective funds.

G. Should either the revolving liability loss or property loss funds be exhausted while the legislature is in session, a special appropriation may be requested by the department of administration for monies to meet the needs of the funds for the remainder of the year. Should the funds be exhausted at a time when the legislature is not in session, any final judgment shall accrue interest at the legal rate and shall be payable upon appropriation in the next succeeding regular session of the legislature.

H. All monies deposited in the revolving property loss and liability funds are appropriated to the depart-

ment of administration for use pursuant to this section and shall be exempt from the provisions of § 35-190, relating to lapsing of appropriations, and § 35-193.01.

I. Monies in the funds established pursuant to subsections A and B of this section shall not be used for administrative costs, other than costs directly related to a liability or property loss claim, without approval of the joint legislative budget committee.

Appendix E — First Amended Complaint

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

KEVIN RUTLEDGE, *Plaintiff,* v. ARIZONA BOARD OF REGENTS, ARIZONA STATE UNIVERSITY, FRANK KUSH, WILLIAM MASKILL, FRED L. MILLER and GARY HORTON, *Defendants.*	Civil Action No. CIV 79-778 PHX WPC FIRST AMENDED COMPLAINT *(Jury Trial Demanded)*

GENERAL ALLEGATIONS

1. The plaintiff, KEVIN RUTLEDGE, is a citizen of the State of Nevada.

2. The Arizona Board of Regents is an agency of the State of Arizona entrusted with the supervision of Arizona colleges and universities, and a citizen of the State of Arizona. Arizona State University is an agency of the State of Arizona under the direction and control

of the Arizona Board of Regents, and a citizen of the State of Arizona. Frank Kush is a citizen of the State of Arizona, and at all times material hereto was and is an employee of Arizona State University and head football coach for Arizona State University. William Maskill is a citizen of the State of Arizona, and at all times material hereto was and is an employee of the Arizona State University and an assistant football coach for Arizona State University. Fred L. Miller is a citizen of the State of Arizona, and at all times material hereto was and is an employee of Arizona State University and the athletic director for Arizona State University. Gary Horton is a citizen of the State of Arizona, and at all times material hereto was and is an employee of Arizona State University and an assistant football coach for Arizona State University.

3. Jurisdiction is founded on diversity of citizenship, the existence of a question under a Federal Statute and amount. Jurisdiction is conferred since the action arises under U.S.C. Title 42, §§ 1983 and 1985; and original jurisdiction is conferred by U.S.C. Title 28, § 1343 in reference to questions arising under U.S.C. Title 42, §§ 1983 and 1985, as herein more fully appears. The matter in controversy exceeds, exclusive of interests and costs, the sum of Ten Thousand Dollars ($10,000.00).

4. Pursuant to the provisions of A.R.S. § 12-821 a claim based on the facts alleged herein was presented to the Arizona Board of Regents on or about August 24, 1979, and formally rejected on September 8, 1979, by the said Board of Regents at a meeting held in Tucson, Arizona.

5. The plaintiff was, during high school, an All-State football player at Gilbert High School, Gilbert, Arizona, who was heavily recruited by several colleges and offered a full football scholarship to the University of Arizona.

6. The plaintiff had a long desire to play football for Arizona State University, (A.S.U.). Plaintiff's parents were contacted in 1977 by defendant Kush, football coach for Arizona State University, and the plaintiff was encouraged to attend and play football at A.S.U.

7. The plaintiff was informed that no scholarship would be available during the fall term of his freshman year. However, he was advised that beginning the second semester of the 1977–78 school year, he would be given a full football scholarship.

8. The plaintiff entered A.S.U. in the fall of 1977 on the condition that he was to receive a football scholarship beginning the second semester of his first year. Although no written contract was signed, the plaintiff did receive full athletic financial aid beginning the second semester of his freshman year.

9. During the plaintiff's 1977 football season, he played second string defensive back behind John Harris, an All-American, and shared punting duties on the varsity football team at A.S.U. The plaintiff averaged 40.8 yards per punt during the 1977 football season and was selected to appear as one of two "Sun Devil Stars" in the October 3, 1977 *Devils Digest*. As a result of his athletic endeavors his freshman year, the plaintiff was one of the few freshman to be awarded a varsity letter.

10. Early in 1978, subsequent to the conclusion of the 1977 football season, the plaintiff was involved in an automobile accident which resulted in his receiving injuries to his face and chest.

11. As a result of the injuries the plaintiff received, or otherwise, he developed an infection in his chest. Plaintiff was not aware of the existence of the infection, but knew he did not feel "right." The infection had a deleterious effect on the plaintiff's athletic abilities as it caused him to remain in a weakened state and he

failed to gain weight in spite of training table meals at both spring and fall practice in 1978.

12. The problems caused by the injuries and infection manifested themselves during spring training in 1978 and in the subsequent fall practice where the plaintiff first encountered defendant Maskill. Although at the inception of fall football practice in 1978, the plaintiff was first string defensive back, by the conclusion of fall practice at Camp Tontozona, Gila County, Arizona, he had been reduced to last string at that position, although he retained his status as starting punter for the A.S.U. football team.

13. Prior to the commencement of fall practice in 1978, the plaintiff did sign a scholarship contract. Plaintiff never received a copy of said contract.

14. Upon returning to Tempe from fall practice at Camp Tontozona, the plaintiff continued to feel weak and was unable to gain weight. He requested that he be "red-shirted" (allowed to sit out the 1978 season as a player, but to continue to practice with the team). Said request was granted by defendant Kush, and the plaintiff watched the first game on September 9th, 1978 against the University of the Pacific from the stands.

15. During the week of practice following the first game (on or about September 11, 1978), the plaintiff was informed by defendant Maskill that he had not been "red-shirted" and was told to begin punting practice.

16. Approximately twenty minutes later on that same day, while the entire team was lined up for exercises, defendant Kush, within hearing of the team, called the plaintiff a "liar" and subjected him to ridicule in front of his peers for claiming that he had been "red-shirted."

17. Thereafter, at the insistence of Kush, the plaintiff again reported as a full time player and a starting punter. Although he continued to be underweight and

weakened by his infection, the plaintiff continued to practice and play in scheduled games in 1978. Defendants Kush and Maskill made no attempt to determine why plaintiff felt weak or why he was unable to gain weight.

18. On October 29th, 1978, during the course of the A.S.U.–University of Washington game played in the State of Washington, the plaintiff returned to the bench following what coach Kush considered to be a poor punt. Defendant Kush approached the plaintiff in a fit of anger and again ridiculed the plaintiff. Defendant Kush did further assault and batter the plaintiff by grabbing his helmet with both hands and shaking the plaintiff's head from side to side while yelling obscenities at the plaintiff. The helmet came loose and defendant Kush did then throw a punch under the face mask, striking the plaintiff on the mouth.

19. Defendant Kush then, subsequent to the humiliating 41 to 7 loss to the University of Washington, and in an effort to preserve his own reputation, held the plaintiff up to public ridicule by informing news reporters that A.S.U.'s kicking game was "sorry" and that the plaintiff would never kick again for A.S.U.

20. The plaintiff was not permitted by defendant Kush to thereafter kick again for A.S.U. in practice or in any regularly scheduled season games during the 1978 season. Plaintiff's punting average had fallen to 34.6 yards in 1978.

21. During or immediately after the 1978 football season, unknown to plaintiff, defendant Kush had recruited and offered a full scholarship to a new punter.

22. Subsequent to the 1978 football season in January–February, 1979, the plaintiff's infection was discovered by his own physician and cured. The plaintiff promptly began to gain weight and strength.

23. The plaintiff reported on or about March 12, 1979 for spring practice, but was almost immediately put on notice by defendant Maskill that it would be better if he decided to quit the A.S.U. team and enter another school. Plaintiff was again embarrassed and ridiculed in front of the majority of the team.

24. Although plaintiff's punting and general play were greatly improved during the 1979 spring training, he was not permitted to scrimmage or play in any exhibition games.

25. On or about April 12th, 1979, for no apparent reason, defendant Kush specifically asked the plaintiff to quit the team.

26. During the course of the remainder of spring practice in 1979 the plaintiff was singled out and subjected to abuse, scorn and ridicule by defendants Kush and Maskill all in an attempt to have him quit the team and forsake his scholarship relation with A.S.U.

27. By virtue of the provision of the Constitution and By-Laws of the National Collegiate Athletic Association (NCAA), which governs athletic activities at A.S.U., plaintiff, once having been granted an athletic scholarship at A.S.U., could have that scholarship revoked only for good cause, and only after a proper hearing, if so requested. Under NCAA rules, "institutional aid may not be gradated or canceled during the period of its award on the basis of (i) a student-athlete's ability or his contribution to a team's success, (ii) because of an injury which prevents the recipient from participating in athletics or (iii) for any other athletic reason."

28. Because of the constant abuse, intentional infliction of mental distress and defamation of his character by Kush and Maskill, the plaintiff was forced to leave A.S.U. and the A.S.U. football squad and transfer to the University of Nevada at Las Vegas, without a

scholarship. Defendants refused to consent to plaintiff's transfer, making plaintiff ineligible for financial aid for one year under NCAA rules. Pursuant to NCAA rules, the plaintiff will have to "red-shirt" his first year at his new school, and therefore, will have to attend college an extra semester to complete his football eligibility.

COUNT ONE

RUTLEDGE v. KUSH

29. Paragraphs 1 through 28 are incorporated herein by reference as if more fully set forth at length.

30. Due to the provisions of Article III, Section 4 of the Constitution of the National Collegiate Athletic Association and other provisions thereof, the only way for defendant Kush to have the use of the scholarship given to the plaintiff was to harass him into quitting the team and abandoning his contract with A.S.U.

31. In an attempt to accomplish the above and further to avoid the hearing requirements of Article III, Section 4(g) of the Constitution of the National Collegiate Athletic Association, defendant Kush acting on his own behalf and A.S.U.'s did carry out a pattern of harassment, embarrassment, defamation and intentional infliction of mental distress upon the plaintiff.

32. In furtherance of this pattern, defendant Kush did instruct his assistants including defendant Maskill, and further, did conspire with them to cause the plaintiff to terminate his contractual and advantageous business and educational relationship with A.S.U.

33. The acts of defendant Kush during the October 28, 1978 football game with the University of Washington did constitute assault and battery upon the plaintiff by defendant Kush.

34. The acts of defendant Kush in calling the plaintiff a liar and subjecting him to public ridicule and scorn did unjustifiably defame the character of the plaintiff.

35. The acts of defendant Kush as previously set forth did constitute an intentional interference with the plaintiff's contractual and advantageous business and educational relationship with A.S.U.

36. The acts of defendant Kush in requesting his assistants to aid him in the aforementioned plan and their agreeing to do so did constitute a conspiracy to interfere with the plaintiff's contractual and advantageous business and educational relationship with A.S.U.

37. As a result of the aforementioned conduct of the defendant Kush, the plaintiff has or will suffer actual damages in an amount in excess of One Hundred Thousand Dollars ($100,000.00).

38. The aforementioned conduct of defendant Kush was willful and deliberate and warrants the award of punitive or exemplary damages in an amount of at least One Million Dollars ($1,000,000.00).

COUNT TWO

RUTLEDGE v. MASKILL

39. Paragraphs 1 through 38 are incorporated herein by reference as if more fully set forth at length.

40. At all times relevant, Maskill was an employee of Arizona State University and an assistant to defendant Kush.

41. On his own initiative and on directions of and in conspiracy with defendant Kush, Maskill did defame, publicly ridicule and intentionally inflict emotional distress upon the plaintiff in an effort to cause the plaintiff

to abandon his contractual and advantageous business and educational relationship with A.S.U.

42. As a result of the aforementioned conduct of the defendant Maskill, the plaintiff has or will suffer actual damages in an amount in excess of One Hundred Thousand Dollars ($100,000.00).

43. The aforementioned conduct of defendant Maskill was willful and deliberate and warrants the award of punitive or exemplary damages in an amount of at least One Million Dollars ($1,000,000.00).

COUNT THREE

RUTLEDGE v. A.S.U., MILLER and THE ARIZONA BOARD OF REGENTS

44. Paragraphs 1 through 43 are incorporated herein by reference as if more fully set forth in length.

45. At all times material, A.S.U. and the Board of Regents (Board) were the employers and principals of defendants Kush and Maskill. As athletic director, Fred L. Miller has direct supervision and control over Kush and Maskill.

46. A.S.U., the Board and Miller are vicariously liable to the plaintiff for Kush and Maskill's intentional infliction of mental distress, assault and battery and defamation of the plaintiff and for failure to properly control and supervise the said Kush and Maskill.

47. A.S.U., the Board and Miller are separately liable to the plaintiff for employing and negligently failing to supervise defendants Kush and Maskill whom they knew or should have known, habitually used tactics such as previously described herein to cause players to resign from the team in order to avoid the provisions of the NCAA constitution and in order to make scholarships available for others.

48. The failure of A.S.U., the Board and Miller to supervise and control their agents to prevent them from harassing the plaintiff into forsaking his contractual and advantageous business and educational relationship with A.S.U. did constitute a breach of contract, both express and implied with the plaintiff.

49. Certain of the acts described above constitute a breach of contract and warrant the awarding of attorneys' fees to plaintiff pursuant to A.R.S. § 12-341.01.

50. As a result of the aforementioned conduct of the defendants Board, A.S.U. and Miller, the plaintiff has or will suffer actual damages in an amount in excess of One Hundred Thousand Dollars ($100,000.00).

COUNT FOUR

RUTLEDGE v. KUSH and MASKILL

51. Paragraphs 1 through 50 are incorporated herein by reference as if more fully set forth at length.

52. The previously enumerated acts of defendants Kush and Maskill were engaged in under color of state law and said conduct did subject the plaintiff to deprivation of rights, privileges or immunities secured by the United States Constitution and, therefore, did constitute violations of 42 U.S.C. § 1983.

53. As a result of the aforementioned conduct of the defendants Kush and Maskill, the plaintiff has or will suffer actual damages in an amount in excess of One Hundred Thousand Dollars ($100,000.00).

54. The aforementioned conduct of defendants Kush and Maskill was willful and deliberate and warrants the award of punitive or exemplary damages in an amount of at least One Million Dollars ($1,000,000.00).

WHEREFORE, Kevin Rutledge prays for judgment against the Arizona Board of Regents, Arizona State University, Frank Kush, William Maskill and Fred L. Miller, as follows:

Against all defendants and each of them, for:

1. Actual damages in excess of One Hundred Thousand Dollars ($100,000.00).
2. Reasonable attorneys fees.
3. Costs incurred herein.
4. Interest on the amount of judgment at the lawful rate from the date of same until paid.

And against Frank Kush and William Maskill for:

1. Punitive or exemplary damages in an amount in excess of One Million Dollars ($1,000,000.00).
2. Interest on the amount of Judgment at the lawful rate from the date of same until paid.

COUNT FIVE

RUTLEDGE v. KUSH, MILLER and HORTON

55. Paragraphs 1 through 54 are incorporated herein by reference as if more fully set forth at length.

56. On information and belief, since the time of filing the statutorily mandated claim with the Arizona Board of Regents, defendants Kush, Miller and Horton have conspired to prevent, by intimidation and threat, various material witnesses from freely, fully and truthfully testifying as to matters raised in the within complaint.

57. On information and belief, since the time of filing the statutorily mandated claim with the Arizona

Board of Regents, defendants Kush, Miller and Horton have conspired for the purpose of hindering or obstructing the due course of justice with an intent to deny the plaintiff equal protection of the laws by threatening and intimidating potential material witnesses, to prevent the plaintiff from lawfully enforcing his rights and to "cover up" the wrongful acts of defendants Kush and Maskill.

58. Since the filing of plaintiff's claim with the Arizona Board of Regents, defendants Kush and Miller have willfully and maliciously published and disseminated false and inflammatory statements regarding the plaintiff for the purpose of inciting "fans" of Kush to intimidate plaintiff and plaintiff's family in order to deter and discourage plaintiff from enforcing his legal right to pursue claims against the defendants for the actions described herein.

59. The acts of defendants Kush, Miller and Horton as described above did constitute a conspiracy to deny the plaintiff equal protection of the laws and equal privileges and immunities under the laws. The acts of defendants Kush, Miller and Horton were intended to so deprive the plaintiff of his equal privileges and immunities under the laws and have and will result in injury to the plaintiff.

60. The aforementioned acts of defendants Kush, Miller and Horton constitute violations of 42 U.S.C. § 1983 and 42 U.S.C. § 1985 (2).

61. As a result of the aforementioned conduct of Kush, Miller and Horton the plaintiff has and will suffer damages in an as yet undetermined amount.

62. The aforementioned conduct of defendants Kush, Miller and Horton was willful and deliberate and warrants the award of punitive damages in an amount of One Million Dollars ($1,000,000.00).

WHEREFORE, Kevin Rutledge prays:

A. That the Court temporarily restrain and permanently enjoin defendants Kush, Miller and Horton from any further violations of 42 U.S.C. § 1985.

B. For Judgment against Frank Kush, Fred L. Miller and Gary Horton for:

1. Actual damages in an amount to be determined.
2. Punitive or exemplary damages in an amount in excess of One Million Dollars ($1,000,000.00).
3. Reasonable attorneys fees.
4. Costs incurred herein.
5. Interest on the amount of judgment at the lawful rate from the date of same until paid.

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Joint Appendix

Office - Supreme Court, U.S.
FILED
AUG 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1675

In The

Supreme Court of the United States

October Term, 1982

FRANK KUSH, WILLIAM MASKILL,
FRED L. MILLER, AND GARY HORTON,

Petitioners,

v.

KEVIN RUTLEDGE,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MARCH 8, 1982
CERTIORARI GRANTED JULY 2, 1982

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Opinion of the United States Court of Appeals for the Ninth Circuit B1-B21

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RELEVANT DOCKET ENTRIES

9/21/79 Complaint filed, United States District Court, District of Arizona.

11/19/79 Hearing on Defendants' Motions to Dismiss.

11/29/79 Memorandum and Order of District Court granting all Defendants' Motions to Dismiss, dismissing action in its entirety.

12/27/79 Notice of Appeal from Final Judgment of 11/29/79 dismissing Plaintiff's Complaint.

11/12/81 Opinion of United States Court of Appeals, for the Ninth Circuit, affirming in part, reversing and remanding in part.

Opposition

Office - Supreme Court, U.S.
FILED
MAY 26 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1675

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ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION

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ISSUES PRESENTED FOR REVIEW

1. Whether the Court should decline to exercise jurisdiction in this matter and refuse to issue a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

2. Whether the Ninth Circuit Court of Appeals correctly ruled that the Eleventh Amendment to the United States Constitution does not deprive the District Court of jurisdiction over the individual defendants in this case.

3. Whether plaintiff is entitled to the protection against conspiracies to intimidate witnesses and obstruct justice afforded by 42 U.S.C. § 1985(2).

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OPINIONS BELOW; JURISDICTION; AND CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondent accepts petitioners' statement of the Opinions Below; Jurisdiction of the Court; and Constitutional Provisions and Statutes Involved.

STATEMENT OF THE CASE

For the sake of simplicity, the litigants in this action will be referred to throughout this Brief either by their names or by their designations in the trial court, i.e., plaintiff and defendants. In 1977 Kevin Rutledge was a star football player for Gilbert High School when he was first contacted by defendant Kush, then head football coach at Arizona State University (hereinafter "A.S.U.") and encouraged to attend and play football at A.S.U. Plaintiff was informed at that time that no scholarship was available for the fall term of 1977, his first semester at A.S.U., but that a scholarship would become available at the

beginning of plaintiff's second semester. In fact, a scholarship for fall, 1977, was available at the time plaintiff was told otherwise.

Plaintiff played extensively during his first semester, and did receive a scholarship for the following term. After suffering an injury in early 1978, however, plaintiff never again regained his top physical form while at A.S.U. He requested that he be granted permission to sit out the 1978 season (red-shirt) due to his injury and said request was initially granted by defendant Kush. Plaintiff was not in uniform for A.S.U.'s first game of the season.

Kush subsequently decided that he needed Rutledge to play for A.S.U. during the 1978 football season. During the week between the first and second games of the year, he called Kevin a liar and subjected him to ridicule at practice for claiming that he had been "red-shirted."

Thereafter, at the insistence of Kush, plaintiff again reported as a full-time player and starting punter. However, his performance was not up to the level at which it had been prior to his injury.

On October 29, 1978, during the A.S.U./ University of Washington game, Kevin returned to the bench following a poor punt. Kush approached Kevin in a fit of anger, began ridiculing him and hitting him on the helmet. Kush then pushed Kevin's face mask up with one hand and punched Kevin in the mouth with his other hand.

Following the game, which A.S.U. lost 41-7, Kush attempted to make Kevin the whipping boy for the loss by holding him up to public ridicule and telling the newspapers that A.S.U.'s kicking game was "sorry" and that Rutledge would never kick again for A.S.U. Kush was true to his word and Kevin was never again allowed to practice with the team or play in a game during the regular

season.

During the spring football practice of 1979, plaintiff was again embarrassed and ridiculed in front of the team by defendant William Maskill, who was an Assistant Football Coach at A.S.U. Plaintiff was also asked to quit the team by defendant Kush. Because of the constant abuse, both mental and physical, which plaintiff suffered at the hands of defendants Kush and Maskill, plaintiff was forced to leave the A.S.U. football squad, forego his scholarship at A.S.U., and transfer to the University of Nevada at Las Vegas (hereinafter "U.N.L.V.") without a scholarship. The refusal of defendants to consent to plaintiff's transfer to U.N.L.V. meant that plaintiff was ineligible for financial aid during his first year at U.N.L.V.

The actions of defendants in forcing Kevin Rutledge to leave A.S.U. amounted to a breach of Kevin's scholarship contract. The

National Collegiate Athletic Association (hereinafter "N.C.A.A.") Constitution, Article 3, Section 4(c)(1), attached hereto as Appendix A, is incorporated by reference into the football scholarship contracts at A.S.U. and provides that a scholarship may only be revoked for good cause, and not on the basis of a student athlete's athletic abilities, contribution to the team success, or freedom from injury.

The actions of the individual defendants in abusing Kevin Rutledge also constituted assault and battery, intentional interference with contractual rights, defamation, misrepresentation, and intentional infliction of emotional distress. On August 24, 1979, pursuant to A.R.S. § 12-821, plaintiff filed a claim with the Arizona Board of Regents requesting compensation for the damage he had suffered at the hands of defendants. This claim was formally rejected on September 8, 1979, and on September 19, 1979,

plaintiff filed suit against A.S.U., the Arizona Board of Regents, Frank Kush, William Maskill, and Fred Miller in the U.S. District Court, District of Arizona. The Complaint stated claims against Kush and Maskill in their individual capacities for the tortious acts they had committed, and stated claims against Miller, A.S.U., and the Board of Regents for their failure to prevent Kush and Maskill from committing the aforementioned acts while they were in the employment of A.S.U., and holding positions of authority granted to them by the Arizona Board of Regents. On September 21, 1979, the First Amended Complaint was filed which added Gary Horton as a defendant and added a claim for relief pursuant to 42 U.S.C. §1985(2).

From the time the claim with the Board of Regents was filed, defendants Kush, Miller and Horton conspired for the purpose of hindering and obstructing the due course of justice with an intent to deny plaintiff equal protection of the law by threatening and intimidating potential material witnesses, in

an attempt to "cover up" the wrongful acts of Kush and Maskill and prevent plaintiff from lawfully enforcing his rights. Kush, Miller and Horton also published and disseminated false and inflammatory statements regarding plaintiff for the purpose of inciting "fans" of Kush to intimidate plaintiff and plaintiff's family in order to deter and discourage plaintiff from enforcing his legal right to pursue claims against all defendants.

All defendants filed Motions to Dismiss which were granted by The Honorable William P. Copple. The common law claims of plaintiff were dismissed on the basis that the Court lacked subject matter jurisdiction to determine these issues pursuant to the Eleventh Amendment to the United States Constitution, and the federal statutory claims were dismissed on the basis of failure to state a claim upon which relief could be granted.

The United States Court of Appeals for the Ninth Circuit reversed the District's

ruling in part, holding that the individual defendants were not protected by the Eleventh Amendment bar to suit against a state in Federal Court because the claims against them were for acts considered wrongful under general law. See Rutledge v. Arizona Board of Regents, 660 F.2d 1345, 1350 (9th Cir. 1981) wherein the Court stated:

> The mere fact that his wrongs occurred in the scope of his employment in the sense that term is generally used in agency law, does not require the conclusion that a suit in this respect is against the state. It is true, of course, that by reason of the acts of Miller, the appellant under Arizona law may have a claim in the state court against the State of Arizona. See Ariz. Rev. Stat. § 12-821 to 826. The fact that such a claim may exist does not invoke the Eleventh Amendment's bar.

The Ninth Circuit Court of Appeals also reversed the District Court's ruling that plaintiff had failed to state a claim upon which relief can be granted pursuant to 42 U.S.C. § 1985(2). The court correctly found that the first portion of this statute

requires no invidiously discriminatory, class-based animus in order to give a plaintiff a right of recovery. The reason for this distinction which was drawn by the court between the first and second parts of 42 U.S.C. § 1985(2) involves the purpose behind the former, which is to protect the federal government's interest in its own courts. No constitutional concern was present at the time of passage of the first portion of that statute. Rutledge v. Arizona Board of Regents, 660 F.2d 1345 at 1355 (9th Cir. 1981).

The Court of Appeals thereafter denied timely petitions for rehearing filed by plaintiff Rutledge and defendant Miller, respectively, and defendants Kush, Miller, Maskill and Horton then filed a Petition for a Writ of Certiorari.

If permitted to amend his Complaint in the lower court, plaintiff also plans to demonstrate that he is a member of a cogniz-

able class for purposes of the second portion of 42 U.S.C. § 1985(2);[1] that a recovery against the Board of Regents will not be paid from state funds;[2] and that no post-deprivation hearing apparatus existed at A.S.U. to satisfy the due process requirements of the Fourteenth Amendment.[3]

---

[1] Plaintiff was considered by defendant Kush to be in a class which was composed of players who did not measure up to Kush's standards of performance and who were thus undeserving of football scholarships and a place on the A.S.U. roster.

[2] The Arizona Board of Regents receives large amounts of money from sources other than the State of Arizona. Football revenue alone approaches Five Million Dollars, and additional sources of income include contributions from alumni, tuition, and housing fees.

[3] While N.C.A.A. regulations mandate that a hearing procedure be made available to any student athlete whose institutional aid is to be cancelled, no such procedure was available at A.S.U. In any event, Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), which provides that a post-deprivation hearing may at some times be sufficient to satisfy due process requirements, and on which the Ninth Circuit's dismissal of plaintiff's claim pursuant to 42 U.S.C. § 1983 was based, applies only to negligence cases in which property rights are involved. It is inapplicable to intentional deprivations of liberty.

ARGUMENT

I. This is Not an Appropriate Case in Which to Grant a Review on a Writ of Certiorari.

Several reasons exist why the Court should refuse to grant a review on a writ of certiorari in the present matter. First, the ruling of the Ninth Circuit Court of Appeals which petitioners are asking to have reviewed was correct. Second, the decision reversing in part the holding of the District Court is not a final adjudication of the case. The Ninth Circuit's ruling that the Eleventh Amendment did not deprive the District Court of jurisdiction over the individual defendants merely gave plaintiff the opportunity to litigate his claims. It did not decide those claims in plaintiff's favor.

The same is true of the Ninth Circuit's ruling on the prerequisites for maintenance of an action pursuant to 42 U.S.C. § 1985(2). Additionally, in the case of the § 1985(2)

claim, should the court decide not to accept jurisdiction at this time, future events may alleviate the need to decide whether plaintiff must allege a class-based animus in order to maintain an action under the first portion of § 1985(2). The Court of Appeals suggested in its decision that plaintiff should amend his claim under § 1985(2), and if permitted to do so, plaintiff believes he can demonstrate that he was a member of a cognizable class, i.e., that class of football players who did not measure up to Kush's standard of performance and who were thus undeserving of football scholarships and a place on the A.S.U. roster. If plaintiff is a member of a cognizable class for purposes of all 42 U.S.C. § 1985 actions, then the question of whether membership in such a class is a prerequisite to maintenance of a suit pursuant to one subpart of that section becomes moot.

While the Court undoubtedly has juris-

diction to issue a writ of certiorari prior to a final judgment being rendered in the case, it has generally followed the sound policy of awaiting a final adjudication prior to accepting jurisdiction, in order to allow all legal and factual issues to be raised and developed in the courts below. Hamilton Shoe Company v. Wolf Brothers and Company, 240 U.S. 251, 36 S.Ct. 269, 60 L.Ed. 629 (1915); Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 70 S.Ct. 252, 94 L.Ed. 562 (1950); and Panama R. Co. v. Napier Shipping Co., 166 U.S. 280, 17 S.Ct. 572, 41 L.Ed. 1004 (1897). The general policy of the Court concerning review of non-final orders should be followed in this case.

Finally, the issue of whether the individual defendants in this case are amenable to suit in Federal Court is really a factual question of a nature not normally reviewed by this Court. Plaintiff and defendants basically agree that where relief is sought

under general law for the wrongful acts of state officials, Eleventh Amendment immunity does not extend to the wrongful individual action. Plaintiff and defendants also agree that an individual sued in his official capacity is afforded Eleventh Amendment immunities. The bone of contention between the litigants on this issue involves the labelling of the capacities in which the individual defendants undertook their actions toward plaintiff. Review of this factual dispute by this Court is inappropriate. U.S. v. Johnson, 258 U.S. 220, 45 S.Ct. 496, 69 L.Ed. 925 (1924); and Crumady v. The Joachim Hendrik Fisser, 358 U.S. 423, 79 S.Ct. 445, 3 L.Ed.2d 413 (1959) (dissenting opinion of Justice Harlan at 358 U.S. 449).

II. The Ninth Circuit Court of Appeals Correctly Ruled that the Eleventh Amendment to the United States Constitution did not Deprive the District Court of Jurisdiction Over the Individual Defendants in This Case.

Defendants' argument on this issue is that the State of Arizona is the real party in interest in the lawsuit against the individual defendants, and thus the individuals may invoke the doctrine of sovereign immunity to protect themselves from suit in Federal Court. The facts of the case, and the law applicable thereto, show this position to be erroneous. The real parties in interest are the individual defendants named in the lawsuit. The claims against the individual defendants Kush, Maskill, Miller and Horton were clearly brought against them in their individual capacities and not in their capacities as agents of

the State of Arizona. Certainly, the State of Arizona never authorized the defendants to assault and batter the plaintiff; to defame him; to harass and intentionally inflict mental distress on him; to interfere with his contractual rights; to deprive him of his constitutional rights; or to conspire to intimidate witnesses and to obstruct justice.

Unlike the case of Edelman v. Jordan, 415 U.S. 651 (1974), where the plaintiff was requesting relief against a state official for carrying out his statutory duty, the instant case involved wrongful individual action. In Edelman, the suit was not really against the named officials, but rather, against the agency which they represented, the State Program for Aid to the Aged, Blind, and Disabled. The individuals were involved only as agents of the state. Plaintiff claims damages from Frank Kush and others based on their personal

actions.

It is well established that where relief is sought under general law for the wrongful acts of state officials, the sovereign's immunity under the Eleventh Amendment does not extend to wrongful individual action and the citizen is allowed to pursue his remedy against the individual wrongdoer. Ford Motor Company v. Department of Treasury, 323 U.S. 459 (1945). The issue to be decided when considering whether the acts of state agents fall under the protection of the Eleventh Amendment is whether the conduct is authorized state action. New England Patriots Football Club, Inc., v. University of Colorado, 592 F.2d 1196 (1st Cir. 1979).

Defendants cite numerous cases in which individuals sued in their official capacities were viewed as protected under the Eleventh Amendment. These cases are obviously inapplicable to the facts of this

lawsuit. The distinction between suing the individual in his official capacity, and suing him in his individual capacity, is clearly drawn in Ford Motor Company v. Department of Treasury, 323 U.S. 459 (1945). In Ford, the court faced a case where an action had been brought under a state statute prescribing the procedure for obtaining a refund of taxes illegally exacted. This was a standard tax refund case in which Ford was challenging the actions of the state and requesting a refund from the State Treasury. The nominal defendants in that case were joined as representatives of the state, not as individuals. There was no claim by Ford requesting a personal judgment against those defendants. At 323 U.S. 462, the Ford court cites Great Northern Insurance Company v. Reed, 322 U.S. 47, as a demonstration of how cases such as Ford Motor Company differ from the case

presently under scrutiny. The court explained the Great Northern holding as follows:

> In that case, this court held that as the suit was against a state official as such, through proceedings which were authorized by statute to compel him to carry out with state funds the state's agreements to reimburse moneys illegally exacted under color of the tax power, the suit was one against the state. We say that such a suit was clearly distinguishable from actions against a tax collector to recover a personal judgment for money wrongfully collected under color of state law.

The latter situation spoken of by the court in Ford is the same situation we are facing in the case sub judice against the individually-named defendants.

III. Plaintiff is Entitled to the Protection Against Conspiracies to Intimidate Witnesses and Obstruct Justice Offered by 42 U.S.C. § 1985(2).

Defendants' analysis of the first part of 42 U.S.C. § 1985(2) glosses over the two most crucial elements of that part of the statute, namely its language and its intended purpose. Without so much as batting an eye, defendants jump to the conclusion that Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971), which interpreted the provisions of 42 U.S.C. § 1985(3), is equally applicable to claims under the first part of § 1985(2). This is not true.

Griffin, supra, held that there must be some racial or otherwise class-based invidiously discriminatory animus for a private conspiracy to be actionable under the equal protection language of § 1985(3). However,

the part of §1985(2) under consideration in the present case contains no equal protection language, and the proper place to begin the analysis of any statute is the language of that statute. McCord v. Bailey, 636 F.2d 606 (D.C. Cir. 1980). Thus, the showing of a class-based animus, which is necessary to maintain a claim for violation of the equal protection clause, is not needed in the present matter.

The intended purpose of the first part of § 1985(2) is as clear as its language. The Ninth Circuit summarized this purpose in Rutledge v. Arizona Board of Regents, 660 F. 2d 1345, 1355 (9th Cir. 1981), as follows:

> That part was designed to protect the Federal government's interest in its own courts. No constitutional doubt with respect to the power of the Federal government to protect that interest existed in 1871 nor does any exist today. To require that a class-based discriminatory intent be shown to establish a cause of action under the first part of § 1985(2) would attribute to Congress in 1871 a constitutional concern that did not exist.

Three other circuits, in addition to the Ninth Circuit, have recognized that §1985(2) falls into two clearly distinguishable parts. See Brawer v. Horowitz, 535 F.2d 830 (3rd Cir. 1976); McCord v. Bailey, 636 F.2d 606 (D.C. Cir. 1980), cert. den. 451 U.S. 983 (1981); and Hahn v. Sargent, 523 F.2d 461, 469 (1st Cir. 1975). Of these three, the Third and District of Columbia circuits have logically set forth their reasons why no class-based animus is needed for an action under the first part of § 1985(2). Only the Fifth Circuit, in Kimble v. D.J. McDuffy, Inc., 648 F.2d 340 (5th Cir. 1981), has set forth any sort of reasoned opinion as to why the holding in Griffin, supra, should be applicable to cases under the first part of § 1985(2). The Eighth Circuit, which reached the same conclusion in Jones v. U. S., 536 F.2d 269 (8th Cir. 1976), devoted only three brief sentences to the issue, and neglected to provide any analysis with its holding.

In Brawer, supra, the Third Circuit took the time to analyze the legislative history of § 1985(2), and then succinctly drew a distinction between the purposes of the two parts of the section at 535 F.2d 840.

> The latter half of the subsection guards against those obstructions of justice 'in any state or territory' which have as their objects the denial of the equal protection of the laws. . .
>
> The first half of § 1985(2) aims at conspiracies the object of which is intimidation of or retaliation against parties or witnesses, or grand or petit jurors, in any court of the United States. The Federal nexus, then is not the class-based,invidiously discriminatory animus required by the second half of the subsection, but the connection of the proscribed activities to a Federal court.

As the foregoing shows, the Third Circuit correctly realized that before the Federal government could intervene with the administration of state courts, a violation of the equal protection clause of the Fourteenth Amendment would have to exist, and thus a class-based animus would have to exist.

However, the Third Circuit also realized that no special constitutional violation must be found prior to the Federal government having the right to police its own court system. The power to police the Federal courts may be found in Congress's plenary power over the Federal courts. See United States Constitution, Art. 1, Sec. 8, Clause 9; and McCord v. Bailey, supra, at 636 F.2d 614, F.N. 12.

The District of Columbia circuit, in deciding McCord v. Bailey, took an even more detailed look at the history of § 1985(2) before ruling that no class-based animus was needed to bring an action under the first part of that section. At 636 F.2d 615, the Court noted that protection of civil rights was not the only reason for the enactment of the Ku Klux Klan Act of 1871.

> Restoration of civil authority, including restoration of the Federal court's ability to proceed without improper interference, was a major concern.

The history recited goes on to show that fear of a new insurrection in the South was running rampant. The legislators believed that the entire operation of the Federal government was threatened. In fact, the original version of the bill proposed by Representative Shellabarger would have made it a Federal felony to conspire to obstruct justice in state as well as in Federal court. The reason that this language was excised and the equal protection language added to the statute was to prevent an unconstitutional usurpation of state prerogatives. See McCord v. Bailey at 636 F.2d 616.

Even the legislators who opposed the bill conceded Congress's power to take whatever steps it deemed necessary to protect the Federal courts. Senator Thurmond's statement is quoted at 636 F. 617, as follows:

> 'I grant that as to those which are offenses against the United States, they must be taken into the federal courts. The state courts have no jurisdiction of them. For instance,

> to intimidate a witness so as to prevent his attending a Federal court, to tamper with a juror in a Federal court, are offenses, not against the state, but offenses against the jurisdiction of which must be given to the Federal courts.'

The foregoing analysis answers the question raised in defendants' Petition for Writ of Certiorari as to why Federal court litigants should not be required to be class members to maintain a § 1985(2) action, while state court litigants are required to be class members. If the individual states wish to provide civil remedies for interference with the processes of justice in state court, they are certainly entitled to do so. However, before the Federal government may become involved in those processes, equal protection violations must exist.

Defendants raise the specter of an unconstitutional, general Federal tort law coming into effect if this Court should find that no class-based animus is needed to maintain the present action. However, this

worry is unfounded. In 1871, Congress eliminated the original provisions authorizing Federal enforcement of common law crimes and inserted the requirements of an equal protection violation. No limitation, however, is needed on Congress's absolute right to protect the Federal interest in the integrity of the Federal judicial process. There is no way in which a law solely concerned with actions in the Federal courts can be the basis of a general Federal tort law.

As previously noted, the only circuit to have analyzed the question in detail and come to a different conclusion than the Ninth, Third, and D. C. circuits was the Fifth Circuit in Kimble v. D. J. McDuffy, Inc., supra. However, the most compelling opinion in that case is the dissenting opinion of Judge Sam Johnson which thoroughly sets forth the case law and legislative history relevant to the question at hand. The unassailable conclusion of this dissenting opinion, in which six other cir-

cuit judges joined, is that no class-based animus is needed to state a claim pursuant to the first part of 42 U.S.C. § 1985(2).

Additionally, plaintiff has established that he is a member of a cognizable class for all purposes of 42 U.S.C. § 1985. That section does not require that the class being discriminated against be one of the traditionally "suspect" classes.

This was the ruling of the Ninth Circuit in Life Insurance Company of North America v. Reichardt, 591 F.2d 499 (9th Cir. 1979). The Court, in Reichardt, at 591 F.2d 505, concluded that women purchasers of disability insurance are a sufficient class to satisfy the requirements of 42 U.S.C. § 1985.

The Court in Reichardt also affirmatively cites Cameron v. Brock, 473 F.2d 608 (6th Cir. 1973); Azar v. Conley, 456 F.2d 1382 (6th Cir. 1972); Harrison v. Brooks, 446 F.2d 404 (1st Cir. 1971); and Means v. Wilson, 522 F.2d 833 (8th Cir. 1975), cert. den. 424 U.S. 958. In

each of these cases, the courts involved saw the possibility of non-traditional classes satisfying the requirements of § 1985. In Cameron, supra, the class recognized was that of supporters of a sheriff's opponent in a county election. In Azar v. Conley, supra, the possibility of a white middle-class family constituting a class was discussed, while in Harrison v. Brooks, supra, the Court said that property owners would constitute a cognizable class for purposes of § 1985. Finally, in Means v. Wilson, supra, the Indian supporters of a candidate for tribal council were considered a cognizable class under § 1985(3).

The actions of the defendants in causing the damage to plaintiff were actions taken to deny plaintiff the equal protection of the law by discriminating against plaintiff because of his supposed lack of talent on the football field. Plaintiff was considered by the defendants to be in a class, together

with many other previous and present A.S.U. football players, which was composed of players who did not measure up to defendants' standards of performance and who were thus, undeserving of football scholarships.

Throughout the Complaint, at paragraphs 18, 19, 21, 23, 24, 25 and 26, there are allegations that Kush did not believe Rutledge was qualified to play football for A.S.U.

Paragraph 27 speaks of the N.C.A.A. rules which made it impossible for Kush to revoke Rutledge's scholarship because of this so-called "inability" of the plaintiff to play football, thus forcing Kush to use illegal means to regain the use of the scholarship.

Paragraph 47 of plaintiff's Complaint sets out that this condition was not an isolated incident. There were many players who Kush felt did not perform well enough to deserve their scholarships. Against various members of this class of players, tactics sim-

ilar to the ones used against Rutledge have been used many times before. Kush hoped that the players would resign their scholarships and thus, make the scholarships available to others whom Kush deemed were more deserving.

The class of players who did not measure up to Kush's standards of performance was a cognizable class for purposes of 42 U.S.C. § 1985. Thus, plaintiff has stated a claim for relief pursuant to 42 U.S.C. § 1985, regardless of whether or not membership in a cognizable class is required.

IV. By Neglecting to Rule on the Issue as to Whether Plaintiff was Entitled to Amend his Complaint, the Court of Appeals has Made it Virtually Impossible to Determine What Factual Assumptions Must be Accepted by this Court.

At the time of oral argument on defendants' Motions to Dismiss plaintiff's Complaint, plaintiff's counsel requested leave to amend the Complaint in the event that the Court determined that the Complaint was in any way deficient. In its Memorandum and Order, the District Court granted each of the Motions to Dismiss, but failed to allow plaintiff leave to amend. This failure to allow amendment of the Complaint was a violation of the letter and the spirit of the Federal Rules of Civil Procedure. In Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227 (1962), the Supreme Court declared that some reason must be given by a trial court for denying leave to amend or else that denial is improper.

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason . . . the leave sought should, as the rules require, be 'freely given.' Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules. (At 83 S.Ct. 230)

In its decision, the District Court gave no indication of why it had not granted plaintiff's request for leave to amend. It is clear that the underlying facts of the case are a proper subject for relief, and plaintiff should have been given ample opportunity to amend.

In addition, it appears that the Ninth Circuit Court of Appeals refused to make reasonable inferences from facts well pled in the Complaint in order to sustain plaintiff's claims. For example, the Court

neglected to make a reasonable inference from the facts pled that the plaintiff was a member of a class of football players who did not measure up to defendant Kush's standards of performance and who, in Kush's opinion, were not deserving of an athletic scholarship. In contrast, the Court of Appeals relied on matters completely outside the record in order to find that postdeprivation hearings were available to plaintiff.

> As already mentioned, counsel have informed us that certain proceedings growing out of the incidents related by the complaint before us already have taken place. This indicates not only the existence of postdeprivation remedies under Arizona law, but also that appellant has pursued those remedies. 660 F.2d 1345, 1352.

Unless the Court of Appeals was referring to actual litigation in the Superior Court of Maricopa County, Arizona, no such postdeprivation procedures were available to plaintiff. Arizona State University had never set up any procedures for such hearings.

The factual assumptions made by the Court

of Appeals are equally difficult to comprehend when the Court stated that the plaintiff failed to allege a "deprivation" of property rights in plaintiff's Complaint. (660 F.2d 1345, 1353) However, in paragraph 32 of his Complaint, the plaintiff alleged:

> In furtherance of this pattern, defendant Kush did instruct his assistants including defendant Maskill, and further, did conspire with them to cause the plaintiff to terminate his contractual and advantageous business and educational relationship with A.S.U.

And, again in paragraph 35 of his Complaint, the plaintiff alleges:

> The acts of defendant Kush as previously set forth did constitute an intentional interference with the plaintiff's contractual and advantageous business and educational relationship with A.S.U.

Plaintiff clearly described the property rights which he had and alleged that the defendants deprived him of such rights.

V. In its Opinion, the Ninth Circuit Court of Appeals Misapplied the Decision of this Court in Parratt v. Taylor.

The most flagrant error in the opinion of the Ninth Circuit Court of Appeals was not cited by the petitioners -- a complete misapplication of the opinion of this Court in Parratt v. Taylor, 451 U. S. 527, 101 S.Ct. 1908 (1981), as applied to claims under 42 U.S.C. § 1983.

In its opinion, the Court of Appeals held that the availability to plaintiff of a State Court proceeding for the tort of assault and battery satisfied the due process requirements of the Fourteenth Amendment as regards plaintiff's deprivation of liberty at the hands of defendant Kush. This ruling is clearly contrary to the law.

The Court of Appeals based its holding on the case of Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 240 (1981). However, several clear differences exist between

the Parratt case and the present matter. First, the Parratt case involved merely negligent acts by state officials. Five of the Justices of this Court, Justices Stewart, White, Blackmun, Powell and Marshall, specifically limited their decisions in that case to a negligence setting. Second, the Parratt case involved the deprivation of a de minimus property right rather than the right to liberty which was at stake when plaintiff was assaulted and battered by defendant Kush. Justice Blackmun, in his concurring opinion in Parratt, stated at 101 S.Ct. 1918:

> This suit concerns the deprivation only of property and was brought only against supervisory personnel whose simple 'negligence' was assumed but, on this record, not actually proved. I do not read the court's opinion as applicable to a case concerning deprivation of life or of liberty.

The Ninth Circuit's expansive reading of the Parratt case would make it virtually impossible to bring an action pursuant to 42 U.S.C. § 1983 for any act which could be ques-

tioned in a state court proceeding. This was not the intent of the civil rights statutes nor of this Court in deciding Parratt. This Court made its position clear in 1972 in the case of Lynch v. Household Finance Corporation, 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed. 2d 424 (1972), by holding that the mere fact that a property right may be protected under state law does not mean that it is not also protected by the Fourteenth Amendment to the United States Constitution. See also Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). This was recognized again by this Honorable Court in the Parratt case. This Court in Parratt cites a number of cases in which a post-deprivation state court proceeding might have been available under state law to an injured plaintiff, had he chosen to pursue such a remedy, but where the constitutional deprivation could not be cured by such a post-deprivation hearing. See Mullane v. Central Hanover Trust Company, 339 U.S. 306

(1950), Bell v. Burson, 402 U.S. 535 (1971), and Fuentes v. Shevin, 407 U.S. 67 (1972).

In fact, the cases in which a post-deprivation remedy can satisfy the due process clause of the Fourteenth Amendment are the exception rather than the rule. These cases universally involve situations in which a severe danger to the public would arise out of any delay in state action. In Parratt, this Court recognized that the cases where post-deprivation hearings satisfied due process requirements applied only when there existed the necessity of quick action by the state or the impracticality of providing any meaningful predeprivation process.

The fact that the claims in Parratt were for negligence, rather than intentional conduct, was crucial to the decision of this Court. As Justice Rehnquist explained, the loss was not the result of an established state procedure, but rather was a random loss of property. The acts of deliberate assault

and battery by defendant Kush were not random. As the Complaint alleges, the acts of defendant Kush in assaulting plaintiff were part of an ongoing practice of which the University and its officials should have been aware. The ongoing nature of defendant Kush's acts make the rationale applied in the negligence case of Parratt inapplicable to the present situation. This Court in Parratt was merely attempting to avoid the situation where the plaintiff could sue the state for negligence under 42 U.S.C. § 1983 for damages arising from automobile accidents and similar unintentional acts.

The concurring opinions filed by several of the Justices clearly indicate that intentional acts are not covered by the Parratt case. In his concurrence, Justice Blackmun states at 101 S.Ct. 1918:

> Most importantly, I do not understand the court to suggest that the provision of 'post-deprivation remedies', ante at 11, within a state system would cure the uncon-

> stitutional nature of a state official's intentional act that deprives a person of property.

Further support for the position that mere existence of a postdeprivation hearing is insufficient to undo constitutional deprivations may be found in Justice Powell's concurring opinion in the Parratt case at 101 S.Ct. 1921, 1922:

> A due process clause imposes substantive limitations on state action, and under proper circumstances these limitations may extend to intentional and malicious deprivations of liberty and property, even where compensation is available under state law.

Defendant Kush misused his power and abused his position when he willfully and deliberately assaulted and battered Kevin Rutledge. The assault upon Kevin was made possible only because of Kush's position as an officer of the state (Arizona State University) acting under color of law. Kush, as Kevin's football coach and as an athletic "god", had the power to force Kevin off the

team and to force him to relinquish his scholarship. The unequal position of the parties made it impossible for Kevin Rutledge to defend himself or to strike back.

42 U.S.C. § 1983 was intended to provide access to the Federal courts to individuals deprived of constitutional rights under color of state law. In practical terms, this permits a poor black in the South who is subjected to mistreatment by the police chief, or a prisoner subjected to physical abuse by the prison warden, access to the Federal courts (which are insulated from local pressures) for redress.

The plaintiff, Kevin Rutledge, stands in precisely such a position-- he was an insignificant college student daring to protest treatment by a sports idol, the highly popular and successful football coach at A.S.U. Plaintiff's claim is precisely the type that requires access to the Federal courts in order to give him some degree of insulation from

the popular prejudice and passion working in favor of the defendant Kush and against the plaintiff.

CONCLUSION

For the foregoing reasons, plaintiff requests that the Petition for a Writ of Certiorari be denied.

RESPECTFULLY SUBMITTED this 25th day of May, 1982.

STOCKTON & HING

By _____
Robert Ong Hing

234 North Central Avenue
Suite 507
Phoenix, Arizona 85004
Counsel for Respondent

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
County of Maricopa)

ROBERT ONG HING, being first duly sworn upon his oath, deposes and says that he is a member of the Bar of this Court and one of the counsel of record for respondents in this cause; that on this 25th day of May, 1982, he mailed three copies of respondent's Brief in Opposition to the Petition in this cause by depositing same in the United States mail, first-class postage prepaid, to:

Michael L. Gallagher, Esq.
GALLAGNER & KENNEDY
1585 The Arizona Bank Building
101 North First Avenue
Phoenix, Arizona 85003

and that he also mailed forty copies of respondent's Brief in Opposition to the Petition to the Clerk of this Court, first-class postage prepaid; all in compliance

with Supreme Court Rule 28.

Robert Ong Hing

SUBSCRIBED AND SWORN to before me this 25th day of May, 1982.

Notary Public

My Commission Expires:

June 23, 1984

APPENDIX A-1

Appendix A - 1978-1979 Manual of the National Collegiate Athletic Association

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Article 3, Section 4(c)

(c) Financial assistance may not be awarded a prospective student-athlete conditioned on the recipient reporting in satisfactory physical condition. If a student-athlete has been accepted for admission and awarded financial assistance, the institution shall be committed for the term of the original award even though the student-athlete's physical condition prevents him from participating in intercollegiate athletics for any reason.

(1) Institutional aid may not be gradated or canceled during the period of its award on the basis of (i) a student-athlete's ability or his contribution to a team's success, (ii) because of an injury which pre-

vents him from participating in athletics or (iii) for any other athletic reason. [Case Nos. 105, 120]

(2) Aid may be gradated or canceled if the recipient (i) renders himself ineligible for intercollegiate competition; or (ii) fraudulently misrepresents any information on his application, letter-of-intent or tender; or (iii) engages in serious misconduct warranting substantial disciplinary penalty, or (iv) voluntarily withdraws from a sport for his own personal reasons. Any such gradation or cancellation of aid is permissible only if such action is taken for proper cause by the regular disciplinary or scholarship awards authorities of the institution and the student-athlete has had an opportunity for a hearing. Under (iv) above, such gradation or cancellation of aid may not occur prior to

the conclusion of that term (semester or quarter). (Revised: 8/1/72, 8/1/76) [Case Nos. 106, 107, 120]

Petitioner's Brief

No. 81-1675

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CLERK

In The

Supreme Court of the United States

October Term, 1982

FRANK KUSH, WILLIAM MASKILL,
FRED L. MILLER and GARY HORTON,

Petitioners,

vs.

KEVIN RUTLEDGE,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

May a white college football player of unknown political affiliation maintain a claim under 42 U.S.C. § 1985(2) in light of this court's determination in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), that Congress intended to afford relief under § 2 of the Ku Klux Klan Act only to victims of conspiracy prompted by an invidiously discriminatory animus?

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FED. R. CIV. P. 60. 28

OPINIONS BELOW

The Honorable William P. Copple, Judge of the United States District Court for the District of Arizona, issued an unpublished opinion on November 29, 1979. Joint Appendix A1-A7[1] depicts a copy of that unpublished memorandum and order of November 29, 1979, in support of the District Court's judgment dismissing Mr. Rutledge's First Amended Complaint and action in its entirety.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 660 F.2d 1345 (9th Cir. 1981); a copy appears as Pet. App. B1-21.

JURISDICTION

Following his initial Complaint filed on September 19, 1979, respondent Kevin Rutledge filed a First Amended Complaint on September 21, 1979, against the Arizona Board of Regents (hereinafter the "Board"), Arizona State University (hereinafter "ASU"), Frank Kush, ASU's head football coach (hereinafter "Kush"), William Maskill, an ASU assistant coach (hereinafter "Maskill"), Gary Horton, another ASU assistant coach (hereinafter "Horton") and Fred L. Miller, ASU's athletic director (hereinafter "Miller") in the United States District Court for the District of Arizona.

On November 29, 1979, the United States District Court for the District of Arizona entered final Judgment

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[1] The Joint Appendix filed concurrently with this brief incorporates by reference those items from the Appendix to the Petition for a Writ of Certiorari which are deemed material to the question presented for review. Thus, for purposes of clarity, subsequent citations to appendix materials will refer directly to the Petition Appendix (hereinafter referred to as "Pet. App.").

dismissing the First Amended Complaint and action as to all defendants. The United States Court of Appeals for the Ninth Circuit affirmed in part and reversed and remanded in part on November 12, 1981. See Pet. App. B1. The Petition for Writ of Certiorari was filed March 8, 1982, and was granted on July 2, 1982. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Equal Protection Clause of the Fourteenth Amendment and Section 5 of the Fourteenth Amendment:

> Section 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.
>
> * * *
>
> Section 5: The Congress shall have the power to enforce, by appropriate legislation, the provisions of this Article.

The following federal statutes:

> 18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States.
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined

not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 401. Power of court.

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as —

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. § 1503. Influencing or injuring officer, juror or witness generally.

Whoever corruptly, or by threats or force, or by any theatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commission or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person

or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

28 U.S.C. § 1254. Courts of appeals; certiorari; appeal, certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

42 U.S.C. § 1985. Conspiracy to interfere with civil rights.

Preventing officer from performing duties.

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by this means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Obstructing justice; intimidating party, witness, or juror.

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges.

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of person of the equal protection of the laws, or of equal privilege and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to any persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified per-

son as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

The Ku Klux Klan Act, § 2, 17 Stat. 13 (1871).

[I]f two or more persons within any State or Territory of the United States shall conspire together to overthrow, or to put down, or to destroy by force the government of the United States, or to levy war against the United States, or to oppose by force the authority of the government of the United States, or by force, intimidation, or threat to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, or by force, intimidation, or threat to prevent any person from accepting or holding any office or trust or place of confidence under the United States, or from discharging the duties thereof, or by force, intimidation, or threat to induce any officer of the United States to leave any State, district, or place where his duties as such officer might lawfully be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duty, or by force, intimidation, or threat to deter any party or witness in any court of the United States from attending

such court, or from testifying in any matter pending in such court fully, freely, and truthfully, or to injure any such party or witness in his person or property on account of his having so attended or testified, or by force, intimidation, or threat to influence the verdict, presentment, or indictment, of any juror or grand juror in any court of the United States, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or on account of his being or having been such juror, or shall conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to any persons within such State the equal protection of the laws, or shall conspire together for the purpose of in any manner impeding, hindering, obstructing, or defeating the due course of justice in any State or Territory, with intent to deny to any citizen of the United States the due and equal protection of the laws, or to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws, or by force, intimidation, or threat to prevent any citizen of the United States lawfully entitled to vote from giving his support or advocacy in a lawful manner towards or in favor of the election of any lawfully qualified person as an elector of President or Vice-President of the United States, or as a member of the Congress of the United States, or to injure any such citizen in his person or property on account of such support or advocacy, each and every person so offending shall be deemed guilty of a high crime, and, upon conviction thereof in any district or circuit court of the United States

or district or supreme court of any Territory of the United States having jurisdiction of similar offenses, shall be punished by a fine not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, as the court may determine, for a period of not less than six months nor more than six years, as the court may determine, or by both such fine and imprisonment as the court shall determine. And if any one or more persons engaged in any such conspiracy shall do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the person so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages occasioned by such injury or deprivation of rights and privileges against any one or more of the persons engaged in such conspiracy, such action to be prosecuted in the proper district or circuit court of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts under the provisions of the act of April ninth, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication."

STATEMENT OF THE CASE

Mr. Rutledge filed his First Amended Complaint against defendants he described as follows: the Board and ASU are agencies of the State of Arizona; Kush, Maskill, Horton and Miller were at all material times employees of ASU, serving as head football coach, assistant football coaches and athletic director, respectively.

The First Amended Complaint identified Mr. Ru-

tledge's role as a college football player at ASU. Rutledge alleged that he started playing football at ASU as a freshman in 1977 without the benefit of an athletic scholarship but that he was later awarded a football scholarship at ASU prior to fall, 1978. Kush assertedly granted Rutledge's request that he be allowed to sit out his sophomore year, the 1978 season ("red-shirted"). According to Rutledge, Kush reneged on the agreement that he could "red-shirt" and subsequently called him a liar, subjected him to ridicule in front of the team for claiming to have been "red-shirted," and required Rutledge to serve as a punter.

On October 29, 1978, during the ASU — University of Washington game in Seattle, Washington, Rutledge assertedly returned to the bench following a poor punt at which time Kush allegedly threw a punch under the face mask of Rutledge's helmet, striking Rutledge on the mouth. Further, Rutledge alleged that Kush publicly ridiculed him after his poor performance in Seattle, suggested that Rutledge would never play football at ASU again and subjected him to other miscellaneous indignities.

During spring, 1979 practice, according to the First Amended Complaint, Maskill embarrassed and ridiculed Rutledge in front of his teammates and Kush asked Rutledge to quit the team. Rutledge claimed to have been singled out for abuse, scorn and ridicule by Kush and Maskill during the remainder of spring practice, 1979. Rutledge further alleged that ASU, the Board and Miller failed to supervise and control their agents, Kush and Maskill and that he was forced to leave ASU and its football squad and transfer to the University of Nevada at Las Vegas without a scholarship.

The First Amended Complaint contained five counts, each of which incorporated all general allegations and included claims for monetary damages. Counts One

through Three set forth various state law claims sounding in tort and contract.

Count Four alleged that Kush and Maskill, under color of state law, deprived Rutledge of rights, privileges and immunities under the Constitution and thereby violated 42 U.S.C. § 1983.

Count Five identified claimed violations of 42 U.S.C. §§ 1983 and 1985. It alleged that "Kush, Miller and Horton have conspired to prevent, by intimidation and threat, various material witnesses from freely, fully and truthfully testifying as to matters raised in the within complaint."

Count Five further stated that Kush, Miller and Horton had conspired to hinder or obstruct "the due course of justice with an intent to deny the plaintiff equal protection of the laws by threatening and intimidating potential material witnesses, to prevent the plaintiff from lawfully enforcing his rights and to 'cover up' the wrongful acts of defendants Kush and Maskill." Also, Kush and Miller allegedly conspired by means of false and inflammatory statements to encourage others to deter Rutledge from enforcing his legal right to pursue claims against the defendants.

Rutledge described all acts identified in Count Five as "a conspiracy to deny the plaintiff equal protection of the laws and equal privileges and immunities under the laws." Pet. App. E sets forth a copy of the First Amended Complaint.

All parties moved, *inter alia,* to dismiss the district court case for lack of jurisdiction under the Eleventh Amendment. Kush, Maskill, Horton and Miller also moved to dismiss for Rutledge's failure to state a claim under 42 U.S.C. §§ 1983 and 1985. The United States Court for the District of Arizona dismissed the action in its entirety.

The Ninth Circuit Court of Appeals affirmed in part and reversed and remanded in part the District Court's Judgment. The Ninth Circuit completely affirmed the dismissal of the Board and ASU; it held that the Eleventh Amendment precluded the suit against those entities in federal court.

The Ninth Circuit also held that the Eleventh Amendment barred Count Three's charges against Miller for vicarious liability based on Kush's and Maskill's acts. The Ninth Circuit, however, reached a contrary conclusion as to the negligent supervision and 42 U.S.C. § 1985(2) charges against Miller, and the various claims against Kush, Maskill and Horton.

While this aspect of its Eleventh Amendment ruling resulted in partial reversal and remand to the district court, the Ninth Circuit noted the probability "that some or all of appellant's claims will be barred by the doctrines of res judicata and collateral estoppel. Proceedings in the State Court have occurred with results to date adverse to appellant."[2] 660 F.2d at 1351.

Moving on to whether Mr. Rutledge had stated claims under 42 U.S.C. §§ 1983 and 1985, the Ninth Circuit first found that no cognizable 42 U.S.C. § 1983 action existed. It then split consideration of the 42 U.S.C. § 1985(2) claim between the first and second portions of that subsection.

Concluding that Mr. Rutledge had adequately al-

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[2] The Circuit Court's reference is to the jury verdicts of March 20, 1981 and April 20, 1981 (bifurcated trial) rendered in the Superior Court of the State of Arizona which completely exonerated petitioners, as well as all other defendants named in those proceedings. (Respondent voluntarily dismissed petitioner Miller prior to trial in the State Court action). The State Court matter is presently pending before the Arizona Court of Appeals.

leged a claim under the first portion of § 1985(2), the court was "influenced in reaching this decision by the fact that the proper scope of part one of section 1985(2) previously has been uncertain and that the relationship between the parts of section 1985(2) has been obscure to some extent." 660 F.2d at 1355. Because there existed "no sufficient allegation of racial or class based invidiously discriminatory animus," the Ninth Circuit ruled that Mr. Rutledge did not allege a proper claim under the second part of § 1985(2). *Id.*

The jurisdiction of the Ninth Circuit Court of Appeals rested on 28 U.S.C. § 1291. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

SUMMARY OF ARGUMENT

The question which confronts this Court is whether 42 U.S.C. § 1985(2), first clause, a Reconstruction era civil rights statute, provides a civil remedy to a disgruntled white, male college football player for alleged intimidation of potential witnesses on his behalf in a federal court proceeding. It is petitioners' position that the legislative history utilized by this Court in determining the parameters of § 1985(3) applies with equal force to § 1985(2) and thus relief under subsection 2 should be limited to providing redress for those victimized by a conspiracy motivated by invidiously discriminatory animus.

Undoubtedly, Congress is endowed with authority under the Constitution to provide a civil remedy for anyone injured by concerted action to obstruct justice in the federal courts. That Congress possesses the power to create such a comprehensive regulatory scheme has no bearing on the question of whether Congress intended to exercise that power when it enacted the Ku Klux Klan Act in 1871.

Careful analysis of legislative history led this

Court to conclude in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), that "invidiously discriminatory animus" is an essential element of a cause of action under § 1985(3). *Id.* at 102. Subsections (2) and (3) of § 1985 derive from a common origin in section 2 of the Ku Klux Klan Act. Enactment of this predecessor to both subsections was prompted by the desire to eradicate the widespread discrimination practiced against a class of citizens bound together by the quest to secure for the newly freed slaves full and equal participation in the political process. Consideration of these factors should impact equally upon this Court in its identification of those afforded relief under § 1985(2). The Courts of Appeals for two circuits have so concluded.

On the other hand, three Courts of Appeals have reached the contrary conclusion that Congress sought to legislate to the full extent of its Constitutional authority in the enactment of the Ku Klux Klan Act. This misperception of Congressional intent has led these courts to accord conclusive weight to the absence of equal protection language in certain clauses of § 1985(2). It is petitioners' position that these courts' narrow focus upon the syntax of § 1985(2) does not comport with this Court's analysis in *Griffin* which construed the statute in light of manifest Congressional intent. Moreover, any minimal benefits which may derive from expanding the scope of the statute beyond the intent of its drafters would be outweighed by attendant problems.

ARGUMENT

I. *Well-reasoned Judicial Construction in Griffin v. Breckenridge, 403 U.S. 88 (1971), Confirmed the "Invidiously Discriminatory Animus" Criterion for § 1985(3) Actions, and This Court May Likewise, by Analysis of Text, Companion Provisions and Legislative History, Require All § 1985(2) Claimants To Meet That Standard.*

The relevant portions of 42 U.S.C. § 1985(2) read as follows:

> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, . . .; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

42 U.S.C. § 1985(2).

Mr. Rutledge's remaining 42 U.S.C. § 1985(2), first portion, claim after the Ninth Circuit opinion is this: "[o]n information and belief, since the time of filing the statutorily mandated claim with the Arizona Board of Regents, defendants Kush, Miller and Horton have conspired to prevent, by intimidation and threat, various material witnesses from freely, fully and truthfully testifying as to matters raised in the within complaint." (See Pet. App. E-111). These are the allegations of the First Amended Complaint which fall within the purview of the first clause of § 1985(2).

In a carefully reasoned opinion, this court in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), concluded that "invidiously discriminatory animus" is a requisite element of a cause of action under § 1985(3). *Id.* at 102. The conclusion that the Forty Second Congress intended only to reach class based conspiracies was not the product of a detached, myopic analysis of the language in § 1985(3) as presently codified. Rather, this Court immersed itself in legislative history to gain an appreciation of both the evil

which impelled Congress to act, and the concerns raised in debate which led to a narrowing of the broad sweep of the Act as originally proposed.[3] Consideration of these same contextual indicia leads inexorably to the conclusion that § 1985(2) is also limited to those conspiracies motivated by animus towards the classes Congress sought to protect when it enacted the Ku Klux Klan Act.

Initially, it should be noted that subsections (2) and (3) of § 1985 share a common origin in section 2 of the Ku Klux Klan Act, 17 Stat. 13 (1871).[4] A division of

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[3] In construing the statute, courts may properly recur to the history of the times when the statute was enacted. *Great Northern Railway Co. v. United States*, 315 U.S. 262, 273 (1942); *Missouri-Kansas-Texas Railroad Co. v. Early*, 641 F.2d 856, 857 (10th Cir. 1981). Thus, in *General Building Contractors Association, Inc. v. Pennsylvania*, 50 USLW 4975 (June 29, 1982) (No. 81-280), this Court appplied a similar analysis to hold that claimants under 42 USC § 1981 must prove intentional discrimination. Although the express terms of § 1981 do not require intentional discrimination, this Court looked beyond the literal terms of the statute and embarked upon a detailed inquiry in order to ascertain legislative intent. After tracing the origin of the statute, and analyzing Congress' concerns at the time of its enactment as evidenced by relevant Congressional debate, this Court properly implied intentional discrimination as an element under § 1981 in order to afford the statute the scope contemplated by Congress.

[4] Further indicia of the interrelationship of subsections (2) and (3) appears from the fact that the terms of 42 U.S.C. § 1985(2) contain no remedial provision. Instead, 42 U.S.C. § 1985(3) states the circumstances under which there is a civil cause of action for any of the 42 U.S.C. §1985 conspiracies:

> [I]n any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3). The interrelationship between subsections (2) and (3) of § 1985 is thus evident.

of the Act into its various subsections occurred in conjunction with the codification of federal laws into the Revised Statutes of the United States.[5] However, any distinction which might be drawn from the present division of § 1985 must be ignored. As this court has previously noted, when construing the Revised Statutes "it is presumed that [Congress] intended to transfer the sense" of the original laws. *Pott v. Arthur,* 104 U.S. 735, 736 (1881), *quoted in Kimble v. D.J. McDuffy, Inc,* 648 F.2d 340, 345 n. 6 (5th Cir.) (en banc), *cert. denied,* 102 S.C. 687 (1981).

Focusing then upon the evil sought to be remedied, there can be no doubt that the Forty Second Congress perceived the existence of a far flung, yet well organized conspiracy which sought, through the use of violence and intimidation, to deprive the class of newly freed slaves of their right to participate fully and equally as citizens of the United States.

The legislative history is replete with references to the animus, racial and political in nature, which fueled the conspiracy. In his concluding remarks to the House of Representatives, the promoter of the legislation, Representative Shellabarger, seized upon the nature of the conspiracy when he commented:

> [T]he South and ruling half of the Democratic party is now engaged in the business of overthrowing the political rights of the freed race and of all constitutions and law securing them, [an overthrow that] is satisfactorily progressing under the cover of the night and the mask, and of perjury, by means of scourgings, burnings and butcheries . . .

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[5] *See,* An Act to Provide For the Revision and Consolidation of the Statute Laws of the United States, Ch. 140, 14 Stat. 74 (1866).

> . . . men whose scourged, mangled, banished and murdered victims number now, by proximate estimates, hundreds of thousands of this Republic's free citizens, struck because they assumed to have and use, the high franchises of such citizens; . . . men whose purposes are disclosed to us by testimony, sworn and overwhelming, to be the *destruction of the political rights of an entire race of Americans*. . . .

Cong. Globe, 42d Cong. 1st Sess. 516–19 (1871) (emphasis added).

It was not, however, the enormity of the violence which warranted federal legislative intrusion but rather, the political and racial animus which motivated the conspirators. Representative Shellabarger explained the "federal nexus" which provided the impetus for congressional action as follows:

> . . . This inquiry into the first springs and sources of these conspiracies and into the purposes of their work is to us, as legislators, estimating the state of public safety and in adopting measures of protection and redress, *the vital one*. It is the vital one because that if these disorders, which so appall us, be, indeed, the aimless pastime of assassins, who whip and kill for the sport of it or the money of it, then it is only assasination on a scale enlarged to come up in dignity, to dimensions big enough to challenge the mirth of such republican journals as the *New York Post*, and to stimulate into unwonted brilliancy the wit at second-hand of the gentleman from New York, [Mr. Wood.]
>
> *But, sir, if, on the other hand, the conspiracy has its origin in political aims, and if they signify the overthrow, by means of violence, of the governments of states or of laws or Constitution of the United States, then, sir, this thing, jeered at so in this Hall ascends in its guilt to the rank of treason, and its acts arise to the dimensions of WAR.*

Id at 516–17 (emphasis added).

Individuals, black and white, as well as state and federal officials, executive and judicial, fell prey to those who sought to disenfranchise the newly freed slaves. Undoubtedly, Congress' response in Section 2 of the Ku Klux Klan Act should be accorded the sweep necessary to meet a challenge of such character and magnitude. Where two or more conspire, motivated by a desire to deny a class of citizens equal enjoyment of the rights and privileges of citizenship, § 1985(2) should properly be construed to provide redress regardless of whether the incidents of discrimination occur in a federal or state judicial forum. However, to remove class based discriminatory animus as an element of § 1985(2) is to ignore the nature of the problem which faced the Forty Second Congress and, more importantly, to ignore the concerns raised by opponents to the broad sweep of the originally proposed Act; concerns which were assuaged by addition of equal protection language in the final draft.[6]

The legislative history surrounding the adoption of the Ku Klux Klan Act not only sheds light on the nature of the evils sought to be remedied, it also provides,

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[6] The "equal protection" language interspersed throughout the Act evidences Congress' general intent to require a class based animus as a condition of liability. The language was included in clauses which make reference to state-related activities for the additional purpose of grounding Congress' power to legislate upon § 5 of the Fourteenth Amendment. The fact that "equal protection" language was omitted from other clauses does not detract from Congress' intent to require a class based animus for all provisions of the Act. Thus, in *Griffin*, this court held that § 1985(3) required a class based animus, despite the fact that certain provisions of that subsection contain no "equal protection" language. Similarly, in *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975), *cert. denied*, 424 U.S. 958 (1976), the court held that the voting rights clause of § 1985(3), which contains no "equal protection" language, nevertheless requires a class based animus.

upon careful examination of the amendatory process, reinforcement for the conclusion that Congress sought only to reach those conspiracies which were motivated by an invidiously discriminatory animus. In *Griffin v. Breckenridge,* 403 U.S. 88(1971), this Court summarized the Congressional debate and resulting refinement of the Act as follows:

> As originally introduced in the 42d Congress, the section was solely a criminal provision outlawing certain conspiratorial acts done with intent 'to do any act in violation of the rights, privileges, or immunities of another person. . . .' (citation omitted) . . . the enormous sweep of the original language led to pressures for amendment, in the course of which the present civil remedy was added. *The explanations of the added language centered entirely on the animus or motivation that would be required,* and there was no suggestion whatever that liability would not be imposed for purely private conspiracies.

403 U.S. at 99, 100 (emphasis added).

Considerable support can be found for this Court's observation that the bill as finally enacted sought to convey Congress' intent to reach only those conspiracies which were motivated by a desire to deny classes of citizens the equal protection of the laws. Typical is the comment of Representative Hoar reflecting upon the intended parameters of the Act:

> But I may be asked, how do you distinguish the right to interfere in a case like this from the right to interfere in any case where there may be an imperfection in the administration of justice or incomplete security for human rights? Sir, criminals escape punishment in Massachusetts, in Vermont. A railroad company does not stand a fair chance for an impartial verdict before a Wisconsin jury. Is Congress to interfere? My answer to that is this: that it is not possible

> to draw an absolute logical line between these two cases. The difference is a difference of degree. To authorize the interference of Congress there must be, not merely those imperfections and failures in the administration of law which are intendent upon all civil governments alike, but there must be a clear case of denial of government. We cannot interfere to deal with the incidental evils which attend upon republican government; but we should interfere where, we being the judges whether the case exists or not, on our oath responsible to the great tribunal of American people, wherever those evils have attained such a degree as amounts to the destruction, to the overthrow, to the denial to *large classes* of the people of the blessings of republican government altogether.

Cong. Globe, 42d Cong., 1st Sess., 333–34 (1871) (emphasis added).

A similar perception of the limitations of the Act was shared by members of the upper chamber. In response to inquiries concerning the applicability of the phrase "or obstruct the equal and impartial course of justice" the principal proponent of the legislation in the Senate, Senator Edmunds responded:

> Certainly, referring to 'the equal and impartial course of justice' mentioned in the second section on the third page. This obstruction of the equal and impartial course of justice, however, must *under the provisions of all this bill,* go so far as to deny and withhold from citizens of the United States that equality of protection in seeking justice which the Constitution of the United States gives to them. *We do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or a set of men against another to prevent one getting an indictment in the state courts against men for burning down his barn;* but, if in a case like

> this, it should appear that this conspiracy was formed against this man because he was a Democrat, if you please, or because he was a Catholic, or because he was Methodist, or because he was a Vermonter, (which is a pretty painful instance that I have in my mind in the State of Florida within a few days where a man lost his life for that reason), then this section should reach it.

Cong. Globe, 42d Cong., 1st Sess., 567 (1871) (emphasis added). *See also,* Comments of Senator Trumbull, *Id.* at 578–79.

Relying on this Court's approach in *Griffin,* the Fifth and Eighth Circuits have concluded that "invidiously discriminatory animus" is an essential element of a claim under § 1985(2). *Kimble v. D. J. McDuffy, Inc.,* 648 F.2d 340 (5th Cir. 1981) (en banc), *cert. denied,* 102 S.C. 687 (1981); *Jones v. United States,* 401 F.Supp. 168 (E.D. Ark. 1975), *aff'd,* 536 F.2d 269 (8th Cir. 1976), *cert. denied,* 429 U.S. 1039 (1977).

Cognizant of the fact that equal protection language appears in some, but not all, of the clauses of both § 1985(2) and § 1985(3), each of which derives from a common origin, the Fifth Circuit has opined that:

> The Supreme Court did not arrive at its conclusion that § 1985(3) required racial or class-based animus with a hyper-technical analysis of the structure and grammar of the section. Instead, the court examined the overall purpose of Congress in passing the Ku Klux Klan Act, reached the obvious conclusion that Congress did not intend to create a general federal tort law, and held that Congress intended the act to apply only in cases where there was racial or class-based animus. The *Griffin* analysis is not applicable to only a small part of Section 2 of the Ku Klux Klan Act, but to the act in its entirety. If racial or class-based animus is re-

> quired by § 1985(3), it is required by § 1985(2) as well.

Kimble v. D. J. McDuffy, Inc., 648 F.2d at 347. Similarly, and quite properly, the district court in *Jones v. United States*, 401 F.Supp. 168 (E.D. Ark. 1975), focused upon the debates surrounding the amendatory process and concluded that the Cook-Shellabarger amendment, which this Court construed to add the requirement of invidiously discriminatory animus to § 1985(3), applied with equal force to the entirety of the Act.[7] *Id.* at 173.

Three Courts of Appeals have determined that § 1985(2), first clause, does not require a class based animus.[8] *Rutledge v. Arizona Board of Regents*, 660 F.2d 1345 (9th Cir. 1981); *McCord v. Bailey*, 636 F.2d 606 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981); *Brawer v. Horowitz*, 535 F.2d 830 (3d Cir. 1976). Each opinion acknowledges the requirement of a class based animus under § 1985(3), and other portions of § 1985(2). In the words of the Third Circuit Court of Appeals, however, "§ 1985(2) itself subdivides into two parts — that which precedes and that which follows the semicolon." *Brawer v. Horowitz*, 535 F.2d at 840. Thus, using punctuation as the line of demarcation, these courts have excised a single clause from the statute and attributed to it a scope not found in the remainder of the statute.

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[7] This analysis is in keeping with this court's admonition that "we must not be guided by a single sentence or a member of a sentence, but (should) look to the provisions of the whole law, and to its object and policy." *Richards v. United States*, 369 U.S. 1, 11 (1962), *quoting Mastro Plastics Corp. v. Labor Board*, 350 U.S. 270, 285 (1956), *quoting United States v. Boisdore's Heirs*, 8 How. 113, 122 (1850).

[8] The court in *Brawer* held that the plaintiff failed to state a claim for relief under 42 U.S.C. § 1985(2) because the allegations of juror influence were "too remote to fit within the intended ambit of § 1985(2)." 535 F.2d at 840. Thus, the court was able to decide the case without addressing the class based animus requirement, and the portion of the opinion which gratuitously discusses that issue is mere dictum.

These courts have justified their expansive interpretation of the first clause of § 1985(2) by relying upon the absence of equal protection language in that clause. Other clauses within the statute, which have been construed to require a class based animus, have contained equal protection language. Thus, the negative inference has been drawn that by omitting identical language in the first clause of § 1985(2), Congress intended to omit the class based animus requirement as well. *See, McCord v. Bailey,* 636 F.2d at 614.

The distinction between the first clause of § 1985(2) and the remainder of the statute has also been justified by assuming that Congress intended to require a class based animus only where necessary to provide the constitutional power to legislate. Therefore, equal protection language, along with the class based animus requirement, was included only in those portions of the statute legislating state-related activities in order to bring that legislation within the ambit of § 5 of the Fourteenth Amendment. *See McCord v. Bailey,* 636 F.2d at 614 n. 12; *Brawer v. Horowitz,* 535 F.2d at 840. Thus, these courts would conclude that since Congress possessed plenary constitutional power to legislate over federal courts independent of the Fourteenth Amendment, the class based animus requirement was neither necessary nor intended. As the court explained in *McCord,*

> The constitutional basis for the first clause of § 1985(2) is Congress' plenary power over the federal courts . . . Congress lacked an equivalent authority over state courts, so the equal protection language in the second half of § 1985(2) was inserted to ground that portion of the statute on Congress' power under § 5 of the Fourteenth Amendment.

636 F.2d at 614 n. 12.

However, the fact that Congress possesses the con-

stitutional power to legislate to prevent the obstruction of justice in all cases brought in federal court has no bearing on the controlling question of whether Congress intended to exercise that power in 1871. The bold assumption that Congress intended to legislate to the full extent of its constitutional power, and included the class based animus requirement only as a means of establishing a Fourteenth Amendment nexus with the states, is not borne out by the legislative history. In fact, a contrary intent was explicitly stated by Senator Edmunds of Vermont when he reported the bill out of committee. *See* Remarks of Senator Edmunds, *supra,* p. 20.

The extensive legislative history cited in this brief, and the legislative history cited by this court in *Griffin,* clearly indicates that, from the time the Ku Klux Klan Act was introduced in Congress, its focus was on the narrow problem of protecting against class based conspiracies prompted by racial or political motives, or a mixture of both. Nowhere in the extensive congressional debates does there appear the suggestion that Congress even considered providing a civil cause of action to remedy all private conspiracies, as a means of generally regulating the obstruction of justice in federal courts.

Moreover, the argument that the class based animus requirement should be read into the statute only where it is constitutionally required will not withstand careful scrutiny in light of this court's analysis in *Griffin.* In *Griffin,* this court properly determined that § 1985(3) may, under certain circumstances, be constitutionally supported by Congress' power to protect the right of interstate travel, a power which does not derive from the equal protection clause of the Fourteenth Amendment.[9]

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[9] In fact, this Court observed in *Griffin* that perhaps additional constitutional grounds were available to support the Act but found it unnecessary to discuss alternative bases. 403 U.S. at 107.

403 U.S. at 106. Thus, a class based animus was not constitutionally required in *Griffin* and this court's careful analysis of legislative history and its decision to imply this element must be seen to derive from an evaluation of Congressional intent rather than constitutional mandate.

II. *An Expansive Interpretation of § 1985(2) Would Add Little to the Comprehensive Statutory Framework Which Already Exists for Regulating the Obstruction of Justice in Federal Courts, and Would Impose Substantial Practical and Conceptual Problems in Enforcing the Statute.*

Section 1985(2) was intended to afford a special and extraordinary means of redress to a narrow group of individuals. The statute, as construed by this court in *Griffin*, and by the Fifth and Eighth Circuits, provides an effective remedy to any member of a class[10] who suffers injury as a result of "the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment." *Griffin v. Breckenridge*, 403 U.S. at 102.

Expanding the scope of § 1985 beyond its intended purpose would add little to the comprehensive statutory scheme which already exists for preventing the obstruction of justice in federal courts. Congress has exercised its broad power to protect the federal judicial process by enacting an extensive arsenal of criminal penalties sufficient to deter the obstruction of justice. 18 U.S.C. § 1503 provides that one who "endeavors to influence, intimidate, or impede any witness, in any court of the United States . . . shall be fined not more than $5,000 or impris-

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[10] In *Griffin*, this Court declined to enumerate the specific classes of persons entitled to maintain an action under § 1985(3). *Griffin v. Breckenridge*, 403 U.S. at 101 n. 9.

oned not more than five years, or both." Conspiring to commit the same acts is made criminal by 18 U.S.C. § 371. *See United States v. Bonnano,* 177 F.Supp. 106, 114 (S.D.N.Y. 1959), *rev'd on other grounds, United States v. Bufalino,* 285 F.2d 408 (2d Cir. 1960). Additionally, 18 U.S.C. § 401 empowers courts of the United States to punish the obstruction of justice "by fine or imprisonment, at its discretion. . . ."

In enacting these statutes, Congress did not intend to provide a civil cause of action for damages. *E.g., Hanna v. Home Insurance Co.,* 281 F.2d 298, 303 (5th Cir. 1960), *cert. denied* 365 U.S. 838 (1961); *O'Dell v. Humble Oil & Refining Co.,* 201 F.2d 123, 127 (10th Cir. 1953), *cert. denied,* 345 U.S. 941 (1953); *Fiorino v. Turner,* 476 F.Supp. 962, 963 (D. Mass. 1979) (18 U.S.C. § 371); *Burch v. Snider,* 461 F.Supp. 598, 602 (D. Md. 1978).

Congress' expressed preference for regulating the obstruction of justice in federal courts with criminal rather than civil penalties strongly indicates that it did not, in a conspiracy statute enacted during the Reconstruction era, intend to create a civil cause of action for conspiracies unrelated to the racial and political problems of that period. Moreover, it is unlikely that Congress would provide an expansive civil cause of action for *conspiring* to obstruct justice and yet intentionally decline to provide such an action for *individually* obstructing justice.

Quite apart from the problem of legislative intent, the existence of an extensive criminal enforcement scheme cautions against the expansion of § 1985(2) beyond its original function of remedying conspiracies motivated by a class based animus. The creation of new civil remedies will add little in the way of deterrence or enforcement to the comprehensive scheme which already exists.

Balanced against these limited benefits are the

considerable practical and conceptual problems which would result from interpreting § 1985 to create a general conspiracy tort. Limited to its intended scope, § 1985 affords relief to any member of a proper class injured as a result of the proscribed conduct. If, however, § 1985(2) is expanded to encompass all individuals, even non-class members, a serious standing problem arises.

No better illustration could be offered than the allegations of the present case. Mr. Rutledge grounds his § 1985(2) claim on the defendants' alleged conspiracy to intimidate and threaten unspecified witnesses in Mr. Rutledge's federal court action. Under the language of § 1985(3), however, it is the witnesses, and not Mr. Rutledge who have standing to maintain a § 1985 action. That section provides that "a party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation. . . ." 42 U.S.C. § 1985(3). Thus, a party may maintain a § 1985 action only if the "force, intimidation, or threat" is directed against him and results in injury. As one court has cogently remarked:

> The statute [§ 1985(2)] creates a cause of action for "parties" only insofar as they are themselves deterred from or injured on account of testifying or attending federal court. *The plain words of the statute do not give parties a right to sue based on intimidation of their witnesses.*

Burch v. Synder, 461 F.Supp. 598, 600 (D. Md. 1978) (emphasis added). This interpretation is entirely consistent with Congress' intent in enacting the statute:

> The debates on the Ku Klux Act as they relate to what is now § 1985(2) bespeak a Congressional intent to insulate witnesses, parties and grand or petit jurors from conspiracies *to pressure or intimidate them in the performance of their duties,* and an intent to guard against con-

> spiracies the object of which is to deny citizens the equal protection of the laws.

Brawer v. Horowitz, 535 F.2d at 839 (emphasis added). The statute "was intended to protect against direct violation of a party or a witness's right to attend or testify in federal court." *Kimble v. D. J. McDuffy, Inc.*, 648 F.2d at 348.

Even assuming that a party, such as Mr. Rutledge, who has not personally been threatened or intimidated has standing to sue under § 1985(2), a troublesome problem exists when one attempts to identify resultant damages. A party who has not been personally subjected to "force, intimidation, or threat" has certainly suffered no direct damage. It could be argued that some indirect damage may occur to a party as a result of threats or intimidation of witnesses which cause the witnesses to refuse to testify or to testify ineffectively on the party's behalf.[11] However, that argument has no merit in cases, such as this, where the substantive federal claims have been dismissed and the possibility of any claim proceeding to trial is remote.[12] Since the witnesses will quite likely not even

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[11] The proper remedy for a party suffering such indirect injury lies in the post-judgment relief available under rules 59 and 60, Fed. R. Civ. P.

[12] Rutledge filed claims arising from the same set of operative facts in both state and federal court. The Ninth Circuit Court of Appeals dismissed all federal claims from the federal action, with the exception of the § 1985(2) claim, but left intact portions of the state law claims. Noting, however, that results to date in the State court proceedings had been adverse to Mr. Rutledge, the Court explained that "[i]t is likely, however, that some or all of appellant's claims will be barred by the doctrines of res judicata and collateral estoppel. . . It is therefore clear that the state court judgment denying relief on tort theories will operate to preclude consideration of the same facts on constitutional grounds." *Rutledge v. Arizona Board of Regents*, 660 F.2d at 1351.

have an opportunity to testify in federal court, it would appear that Mr. Rutledge could show no damage whatsoever, no matter how indirect.

An expansive interpretation of the first clause in § 1985(2) would also create problems by establishing different standards for actions brought in federal and state court. Conspiracies formed in connection with state court proceedings would not be actionable unless there were "some racial, or perhaps otherwise class based invidiously discriminatory animus behind the conspirator's action," *Griffin v. Breckenridge*, 403 U.S. at 102, while conspiracies formed in connection with federal court proceedings would require no such showing. Thus, where, as here, the alleged threats and intimidations occurred prior to the filing of a complaint, a plaintiff such as Mr. Rutledge will be permitted to file the complaint in federal court in order to obtain a § 1985(2) cause of action for damages where none otherwise would have existed.

Another problem inherent in disparate treatment of conspiratorial actions also surfaces in this case. As noted above, Mr. Rutledge has pursued claims arising from the same set of operative facts in a state tribunal. Undoubtedly, those witnesses presumably the object of the alleged conspiracy must be considered participants in a state court proceeding, triggering the class based animus requirement. Thus, on remand the District Court would be faced with the difficult task of deciding whether these witnesses may be properly characterized as serving a dual role under § 1985(2) in order to afford Mr. Rutledge the benefit of proceeding under the more lax requirements attendant to federal court proceedings.

CONCLUSION

For the foregoing reasons, petitioners urge this Court to construe § 1985(2) to require proof of "invidiously discriminatory animus". That portion of the opinion of the United States Court of Appeals for the Ninth Circuit reaching a contrary result should be reversed.

RESPECTFULLY SUBMITTED this 16th day of August, 1982.

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Office - Supreme Court, U.S.
FILED
SEP 17 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1675

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BRIEF FOR RESPONDENT

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QUESTION PRESENTED

May a Plaintiff who has brought an action in Federal District Court against Defendants for, inter alia, assault and battery, maintain a claim under 42 U.S.C. § 1985(2) without an allegation of racial or class-based invidiously discriminatory animus, where Defendants in the federal action have conspired to threaten and intimidate potential witnesses for Plaintiff?

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OPINIONS BELOW; JURISDICTION; AND CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondent accepts Petitioners' statement of the Opinions Below; Jurisdiction of the Court; and Constitutional Provisions and Statutes Involved.

STATEMENT OF THE CASE

In 1977 Plaintiff* Kevin Rutledge ("Rutledge") was a star football player for Gilbert High School when he was first contacted by Defendant Frank Kush ("Kush"), then head football coach at Arizona State University (hereinafter "A.S.U.") and encouraged to attend and play football at A.S.U. Rutledge was informed at that time that no scholarship was available for the fall term of 1977, his first semester at A.S.U., but that a scholarship would become available at

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* The litigants in this action will be referred to in this Brief either by their names or their designation in the trial court, i.e., Plaintiff and Defendants.

the beginning of Rutledge's second semester. In fact, a scholarship for fall, 1977, was available at the time Rutledge was told otherwise.

Rutledge played extensively during his first semester, and did receive a scholarship for the following term. After suffering an injury in early 1978, however, Rutledge never again regained his top physical form while at A.S.U. He requested that he be granted permission to sit out the 1978 season (known as red-shirting) due to his injury and his request was initially granted by Defendant Kush. Rutledge was not in uniform for A.S.U.'s first game of the 1978 season.

Kush subsequently decided that he needed Rutledge to play for A.S.U. during the 1978 football season. During the week between the first and second games of the year, he publicly called Rutledge a liar and subjected him to ridicule at practice for claiming that the reason he did not start

the season was because he had been "red-shirted".

Thereafter, at the insistence of Kush, Rutledge again reported as a full-time player and starting punter. However, his performance was not up to the level previously attained by him prior to his injury.

On October 29, 1978, during the A.S.U./ University of Washington game, Rutledge returned to the bench following a poor punt. Kush approached Rutledge in a fit of anger, began ridiculing him and hitting him on the helmet. Kush then pushed Rutledge's face mask up with one hand and punched Rutledge in the mouth with his other hand.

Following the game, which A.S.U. lost 41-7, Kush attempted to make Rutledge the whipping boy for the loss by holding him up to public ridicule and telling the newspapers that A.S.U.'s kicking game was "sorry" and that Rutledge would never kick again for A.S.U. Kush was true to his word and

Rutledge was never again allowed to practice with the team or play in a game during the regular season.

During the spring football practice of 1979, Rutledge was again embarrassed and ridiculed in front of the team by Defendant William Maskill ("Maskill") who was an assistant football coach at A.S.U. Kush also repeatedly requested Rutledge to quit the team. As a result of the constant abuse, both mental and physical, which Rutledge suffered at the hands of Defendants Kush and Maskill, Plaintiff was forced to leave the A.S.U. football squad, forego his scholarship at A.S.U., and transfer to the University of Nevada at Las Vegas (hereinafter "U.N.L.V.") without a scholarship. The refusal of Defendants Kush and A.S.U. to consent to Rutledge's transfer to U.N.L.V. meant that Rutledge was ineligible for financial aid during his first year at U.N.L.V.

The actions of Defendants Kush and Maskill in abusing Rutledge constituted assault and battery, intentional interference with contractual rights, defamation, misrepresentation, and intentional infliction of emotional distress. On August 24, 1979, pursuant to A.R.S. § 12-821, Rutledge filed a claim with the Arizona Board of Regents requesting compensation for the damage he had suffered at the hands of inter alia Defendants Kush and Maskill. This claim was formally rejected on September 8, 1979, and on September 19, 1979, Rutledge filed suit against A.S.U., the Arizona Board of Regents, Frank Kush, William Maskill, and Fred Miller, the A.S.U. Director of Atheletics, in the U. S. District Court, District of Arizona. The Complaint stated claims against Kush and Maskill in their individual capacities for the tortious acts they had committed, and stated claims

against Miller, A.S.U., and the Board of Regents for their failure to prevent Kush and Maskill from committing the aforementioned acts while they were in the employment of A.S.U., and holding positions of authority granted to them by the Arizona Board of Regents. On September 21, 1979, the First Amended Complaint was filed which added Gary Horton (another assistant football coach at A.S.U.) as a Defendant and added a claim for relief pursuant to 42 U.S.C. § 1985(2).

From the time Rutledge's claim with the Board of Regents was filed, Defendants Kush, Miller and Horton conspired for the purpose of hindering and obstructing the due course of justice by threatening and intimidating potential material witnesses, in an attempt to "cover up" the wrongful acts of Kush and Maskill and prevent Plaintiff from lawfully enforcing his rights. Kush, Miller and Horton also published and

disseminated false and inflammatory statements regarding Plaintiff for the purpose of inciting "fans" of Kush to intimidate Plaintiff and Plaintiff's family in order to deter and discourage Plaintiff from enforcing his legal right to pursue claims against all Defendants.

All Defendants filed Motions to Dismiss which were granted by the Honorable William P. Copple. The common law claims of Plaintiff were dismissed on the basis that the Court lacked subject matter jurisdiction to determine these issues pursuant to the Eleventh Amendment to the United States Constitution, and the federal statutory claims were dismissed on the basis of failure to state a claim upon which relief could be granted.

The United States Court of Appeals for the Ninth Circuit reversed the District Court's ruling in part, holding that the individual defendants were not protected by

the Eleventh Amendment bar to suit against a state in Federal Court because the claims against them were for acts considered wrongful under general law. Rutledge v. Arizona Board of Regents, 660 F.2d 1345, 1350 (9th Cir. 1981).

The Ninth Circuit Court of Appeals also reversed the District Court's ruling that Plaintiff had failed to state a claim upon which relief could be granted pursuant to 42 U.S.C. § 1985(2). The court correctly found that the first portion of this statute requires no invidious discriminatory, class-based animus in order to give Plaintiff a right of recovery, a conclusion reached by two other circuit courts. McCord v. Baily, 636 F.2d 830 (D.C. Cir. 1980); Brawer v. Horowitz, 535 F.2d 830 (3rd Cir. 1976). Rutledge, 660 F.2d at 1355.

The Court of Appeals thereafter denied timely petitions for rehearing filed by Plaintiff Rutledge and Defendant Miller,

respectively, and Defendants Kush, Miller, Maskill and Horton then filed a Petition for a Writ of Certiorari. This court granted Certiorari on July 2, 1982.

SUMMARY OF ARGUMENT

This Court must decide whether a showing of racial or class-based invidiously discriminatory animus is required in order to maintain a cause of action under 42 U.S.C. §1985(2), first clause (the part before the semicolon). Plaintiff contends that the Ninth Circuit Court of Appeals in this case, correctly held that such a showing is not required for Plaintiff to state a cause of action under the first clause of §1985(2) and is only required under the second clause of §1985(2). Section 1985(2) was codified with only minor non-substantive changes from §2 of the Civil Rights Act of 1871. The legislative history behind the Act evidences Congressional intent to preserve order in the government and courts, and preserve the sanctity of the federal judicial process for all citizens in the

face of violent resistance in the Southern states to federal reconstruction following the Civil War; these goals were in addition to Congress' efforts to protect civil rights and promote racial equality. Furthermore, the legislative history leaves no doubt that Congress intended to exercise the limits of its powers in order to preserve the Republic. Congress had the power to enact legislation to protect the federal judicial system and, fully aware of its constitutional powers, passed legislation which would combat interference with the federal courts to the limits of its constitutional authority.

The plain meaning of §1985(2) reflects this congressional intent. The statute purposefully contains equal protection language only in those clauses which dealt with areas where Congress believed it had no other basis for extending federal jurisdiction. No such language is in the

first clause of §1985(2) concerning intimidation of witnesses in federal court since Congress neither needed nor intended to limit itself where it clearly had plenary power to legislate.

In light of the unambiguous meaning of the language of §1985(2) and a legislative history which fully supports a Congressional purpose and intent behind a literal meaning of §1985(2), the Ninth Circuit's ruling that a showing of racial or class-based invidiously discriminatory animus is not required under the first clause of § 1985(2) should be affirmed.

ARGUMENT

I. Congress Did Not Intend to Require a Showing of Racial or Class-based Invidiously Discriminatory Animus In Order to Maintain a Claim Under 42 U.S.C. § 1985 (2), First Clause.

The predecessor of 42 U.S.C. §1985 was §2 of the Civil Rights Act of 1871, commonly referred to as the Ku Klux Klan Act of 1871. Except for some nonsubstanta-

tive reorganization of the statute in 1874, the Act of 1871, later codified at 42 U.S.C. § 1985, remains unchanged from the date of its enactment to the present. The debates leading to the enactment of the Act of 1871 are instructive on the Congressional intent behind § 1985(2), first clause[1] and its

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[1] 42 U.S.C. 1985(2) currently provides:

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in her person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Throughout this brief, the portion of § 1985 (2) before the semicolon will be referred to as the "first clause", and the portion after the semicolon as the "second clause".

proper interpretation. Despite Defendants' representations to the contrary, protection of civil rights was not the only motivation for enactment of the Ku Klux Klan Act of 1871. Of paramount concern was restoration of the Federal Court's ability to proceed without improper interference and to reinforce the sanctity of the federal judicial process for all citizens. The introduction of the statute was a response to concerns of impending anarchy and insurrection in the South following the Civil War. Representative Samuel Shellabarger of Ohio introduced the bill to meet President Grant's March 23, 1871, request for legislation which would aid him in controlling the mounting chaos. In assessing the volatile situation at hand, Grant exhorted that "[a] condition of affairs now exists in some of the states of the Union rendering life and property insecure, and the carrying of the mails and the collection of the revenue dangerous".

Congressional Globe 42nd Congress, 1st Session (1871) 236. During the debates on the bill, Representative Buckley captured the fears of the times with his warning that the Southern states:

> "Still def[y] the national authority, [set] at naught the laws of the country, and [trample] upon the national and political rights of our fellow citizens. The United States mails are stopped; route agents are shot dead while assorting the mails, and others are driven from their routes....In certain communities lawlessness is widespread and on the increase. Crimes are fearfully common. The value of human life is disregarded. Murders go unpunished...Terrorism reigns. The apprehension of violence prevents good men from arresting the evil they see. Id Appendix 190. See also Id. 519 (Remarks of Representative Shellabarger).

The Civil War had only just ended. Although racial tensions were certainly evident, the Nation's and Congress' concerns encompassed more than racial equality and protection of civil rights. Indeed the very operation of government - particularly

the Federal Government which was now facing the task of bringing together a war torn and bitter nation - was threatened.

It was behind this backdrop of massive and frequently violent resistance in the Southern states to federal reconstruction and the inability or unwillingness of state governments to deal effectively with the violence, that the Ku Klux Klan Act of 1871 was introduced.

Confronted with the task of restoring civil authority, Representative Shellabarger introduced the Civil Rights Act of 1871 in the House of Representatives on March 28, 1871. Id. Appendix 67. The Act originally consisted of four (4) sections; §2 eventually became 42 U.S.C. §1985. That section as originally introduced was broad in scope and proposed to provide a federal remedy for a wide variety of offenses against individuals including murder, mayhem and robbery. In addition, §2 of the bill would have made it

a federal felony to conspire with another to commit perjury, subornation of perjury, or criminal obstruction of justice, regardless of whether the offense took place in the course of state or federal proceedings. Id. 317 (remarks of Representative Shellabarger). (See Appendix Part A. for copy of §2 of the Act as originally introduced.)

The purpose of the bill, according to Shellabarger, was to supplement the alleged deficiencies of the Enforcement Act of May 1870: "It is alleged that that act, where it defines and punishes criminally a conspiracy of two or more persons to deprive a citizen of the United States of any right to which he is entitled under the Constitution and laws of the United States, falls worthless because of its too great generality and vagueness in the description of the particular act that shall constitute the crime. It is any conspiracy to deprive a citizen of any right." Id. Appendix 68.

There was nothing in Shellabarger's opening remarks that would contradict his intent that §2 of the Act of 1871 have as wide a scope as possible to deal with the task of restoring civil authority.

The original version of the bill met with considerable opposition due to concerns that the bill as drafted "absorbed the entire jurisdiction of the states over their local and domestic affairs" and was a "sweeping usurpation of universal criminal jurisdiction in the states". Id. 336 (Representative Arthur). Representative Whithorne of Tennessee argued that § 2 effectively empowered Congress to oversee all of the states' functions. Id. 337.

The debate which followed focused on the federalism issues raised by §2. As anticipated by Shellabarger, constitutional objections were raised as to §2 on grounds that it was dangerous to liberty and states' rights. See e.g., Id. Appendix 113

(Representative Farnsworth). The objectors asserted that the states possessed exclusive jurisdiction to formulate criminal codes and Congress had no right to prempt this state perogative. Additional claims were made that the Fourteenth Amendment, by its terms, gave Congress authority to act only in cases involving state action and not in cases involving actions only by private individuals.

This bill's supporters responded that Congress did have the power to deal directly with individual violations of the Constitution, especially where, as here, the states had failed to effectively protect those rights. Representative Hawley expressed the view that while Congress had no power to enact a general criminal code, it did have power to punish conspiracies designed to prevent persons from exercising constitutional rights such as the right to vote or hold federal office. Id. 382-383. Supporters of the bill also insisted that the efforts

to deprive individuals of their constitutional rights in the South was widespread, and that, in many instances, state officials willfully refused to protect individuals or prosecute known offenders. Many expressed well-founded concerns that the judicial process in the South was corrupt and dominated by the Ku Klux Klan. Id. 320-321, 416.

In response to these constitutional objections, Representatives Cook and Shellabarger introduced an amended form of §2. (See Appendix to this brief, Part B, for a copy of the amended form of §2.) This draft contained a list of several offenses directly against agencies or officials of the United States, and conspicuously lacked any requirement that a violation of equal protection rights be shown. This well-defined list of offenses was followed by several clauses which did contain equal protection language and provided remedies for conspiracies to

deprive "any person or class of persons of the equal protection of the laws, or of equal privilege or immunities under the laws." The equal protection portion, Shellabarger noted, was designed to limit the reach of federal jurisdiction over private conspiracies unconnected to federal laws, officers and courts, to those conspiracies "which shall attack the equality of rights of American citizens". Shellabarger felt that the insertion of the equal protection language would meet the criticisms leveled against §2 as originally introduced. Id. 478.

Representative Cook, co-author of the amendment (Id.) explained the logic behind the first group of clauses (including that portion which is now § 1985(2), clause one) in the amended version of §2:

> A citizen of the United States, in any State of the Union, has a right to vote for any officer of the United States Government. He has a right to

> have his cause tried within a United States Federal court where that court has jurisdiction of the case. Now, if there by any combination of men who shall combine and conspire together for the purpose of preventing a legal voter from giving his vote or a witness from testifying in a court of the United States in a proper case as to compel a jury in a United States court to give a false verdict, or to punish him for giving a true verdict, or to punish a witness for testifying truthfully, that combination is an offense against the United States; for the simple reason, easily understood, that it seeks to deprive a citizen of the United States of a right guaranteed to him by the Constitution of the United States. If you can touch in any point or particle any right of a citizen secured by the Constitution of the United States, you might upon the same principle and by the same logic, overthrow the entire Constitution and destroy the whole Government. If we have not a right to legislate by the Constitution we have no authority to legislate for the security of any right. That seems to be perfectly plain...The citizen, in the support or advocacy of national Government, is exercising a right secured to him clearly by the fundamental law of this nation. Hence, a combination to deprive the citizen of that right, or to punish him for its exercise, is an offense against the United States, and may be so declared and punished by national law. Id. 486.

Representative Cook later spoke of the Four-

teenth Amendment as an additional source of rights to be protected by the Act. Id. Cook, one of the Amendment's authors, clearly intended equal protection and access to federal courts to be two separate rights guaranteed under separate provisions of the Constitution.

When the bill moved to the Senate for consideration, Senator Thurman commented upon §2, and with respect to the first clause of §2, did not question Congress' power to deal with offenses concerning federal processes:

> These are to be crimes. Most of them are already crimes, I believe. I think most of them are; but I do not doubt the power of Congress to pass such a law as that. Congress has power to punish a conspiracy to commit treason, although there is no overt act. There can be no treason without an overt act, for the Constitution defines what treason shall be and requires an overt act. But I am willing to admit, at least that is my present impression, that it is competent for Congress to punish a conspiracy to deter or intimidate Federal officers from discharging their duties or to drive them out of their proper jurisdictions. All that may be necessary in order that the laws of the United States

> may be executed; that is to say, the presence of the officers there and their free and unterrified discharge of their duties are essential to the execution of the laws, and under the power which Congress has to pass all laws necessary for the execution of the power conferred upon the Government or any department or officer thereof, it is competent for it to enact laws to punish a conspiracy that shall thus tend to prevent the officers from executing the Federal laws. Id. Appendix 217.

Senator Thurman did object, however, to that portion of §2 which contained equal protection language. It is clear from Senator Thurman's speech that he did not consider the equal protection language to apply to the clauses in §2 dealing with direct federal offenses.

The amended bill was passed on April 20, 1871, and became law shortly thereafter. (See Appendix to Brief, Part C.)

By the Act of June 20, 1874, Congress authorized Secretary of State Hamilton Fish to prepare for publication and distribution the Revised Statutes of the United States,

which Secretary Fish completed on February 22, 1875. As the courts in Kimble v. McDuffy, 648 F.2d 340, 345 (5th Cir. 1981), and Brawer v. Horowitz, 535 F.2d 830, 838 (3rd Cir. 1976) observed, the purpose of Secretary Fish's project was to collect and reorganize all federal laws and statutes, making minor changes in language only where necessary to accomodate the consolidation. The wording and meaning were otherwise wholly unchanged. In the course of this project Secretary Fish reorganized the clauses of §2 of the 1871 Act. The statute has remained unchanged to this day, and is now codified as 42 U.S.C. § 1985. Each part of § 1985 was originally part of §2 of the Act of 1871. It is only because Secretary Fish apparently felt that all clauses dealing with courts and the judicial system should appear together that § 1985(2) assumed its present form.

One must conclude from this examination

of the legislative history that Congress did not intend language concerning equal protection to apply to the provisions of the subsection of the Civil Rights Act of 1871 concerning intimidation of federal witnesses. To begin with, the discussions reveal that the Civil Rights Act of 1871 was designed to combat violence and terrorism in every way which was constitutionally permissible. Intimidation of witnesses and corruption of the political process by the Ku Klux Klan were some of the evils which Congress intended to remedy. Although most of the controversy centered on Congress' jurisdiction over the actions of private individuals under the Fourteenth Amendment, the debates make it clear that Congress did not intend to limit itself to remedies under the Fourteenth Amendment exclusively.

As noted above, §2 of the Civil Rights Act of 1871 as originally introduced by

Representative Shellabarger, met with considerable opposition and doubt as to whether Congress had jurisdiction over matters traditionally covered by state criminal codes. However, the legislative history is clear that these objections were met by redrafting §2 to provide remedies only where some sort of federal nexus was clearly present. This connection took one of two forms. If an agency or officer of the United States was involved, if treason or disloyalty was alleged, or if election to a federal office was concerned, Congress had undoubted power to legislate in the area even without reliance on the newly granted powers of the Fourteenth Amendment, thereby bringing private conspiracies within the scope of the power conferred by the Constitution. No allegation of equal protection violation was necessary to establish a federal constitutional basis.

However, if the violation of rights had no such direct federal involvement, then Congress believed that the statute required an allegation concerning intent to deny equal protection in order to bring private conspiracies clearly within the scope of the power conferred by the Fourteenth Amendment and to avoid an unconstitutional overlap with state criminal codes.

Thus, inserting the equal protection language in some portions limited federal jurisdiction over state crimes to those offenses that also injured a federal interest grounded in the Fourteenth Amendment. No such limitations were required in the bill with regard to protection of the federal interest in its own judicial process, since Congress' constitutional power to preserve the integrity of its federal courts is derived from Article I., Section 8., clause 9, and the accompanying "necessary and proper" clause,

which gives Congress plenary power over the federal courts. See McCulloch v. Maryland, 17 U.S. 316 (1819). There can be no doubt that in light of the onerous political and social circumstances confronting the nation, Congress intended to extend its reach as far as possible under the Constitution in adopting the Civil Rights Act of 1871. The record is devoid[2] of any evidence that Congress intended to require racial or class-based invidious discrimination in an action for harrassment of witnesses in federal court.

[2]Petitioners' Brief cites a couple passages from the legislative debates which refer to the equal protection language as authority to reach private conspiracies. In fact, most of the debate on the amended bill focused on the clauses which required equal protection language. As we have demonstrated throughout the argument in Part I., when examined in context, it is clear that these passages discuss deprivations where an equal protection requirement was necessary because no other federal nexus was present.

II. The Language of The First Clause of § 1985(2) Clearly and Unambiguously Does Not Require A Violation of Equal Protection in Order to Recover Under That Provision.

The legislative history outlined above demonstrates that the syntax of § 1985 (2) was deliberately chosen in light of the 42nd Congress' understanding of constitutional limitations on the reach of federal jurisdiction. Even apart from its legislative history, however, the plain wording of § 1985(2) compels the conclusion that violation of equal protection is only required in its second clause (the part after the semicolon).

A semicolon now separates these two clauses, which were introduced separately and, in the Act of 1871, were separated by additional clauses. The positioning of the two clauses in the present text of § 1985 (2) was apparently the result of Secretary of State Fish's desire to see all provisions dealing with the court systems lumped together and in no way signified their fusion into a single clause. The punctuation of § 1985(2)

both before and after its revision makes clear that the equal protection language applies only to the second clause. Considering the clauses independently does not require "hyper-technical analysis of the structure and grammar of the section", as suggested in Kimble, 648 F.2d at 347; but only the realization that the clauses evolved separately, with separate jurisdictional bases.

There is no reason to believe, as suggested in the Brief for Petitioners, p. 15, that the equal protection language in § 1985(3) should apply to all of § 1985 simply because the remedial portion does. When the evolution of the statute is considered, the inter-relationship of § 1985(2) and § 1985(3) is clear. The remedial section was originally placed at the end of §2 of the Act of 1871, and applied to all of its clauses. In the course of the 1874 revision, this remedial clause

was placed at the end of § 1985(3), although it properly applies to all sections of § 1985. Equal protection language, on the other hand, appeared only in those clauses to which it was meant to apply, as noted supra, and the 1874 revision preserved this careful wording.

Analysis of § 1985 as a whole reveals that the statute is not worded haphazardly or "liberally laced with references to 'the equal protection of the law'," [3] but rather is carefully phrased to mean exactly what it says and reflects the clear and deliberate effort of a concerned Congress to use its full powers to stem the tide of anarchy and to preserve the federal judicial system. (See Appendix D. to this Brief for full text of § 1985.) Section 1985(1) deals with conspiracies to interfere with United States

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[3] Kimble, 648 F.2d at 347.

officials in the discharge of their duties; therefore, no equal protection language is needed or included for § 1985(1).[4] Section 1985(2) includes equal protection language when it refers to state courts in the second clause. There is no reference to equal protection in the first clause of § 1985(2), dealing with federal courts. Section 1985(3) does contain equal protection language, except where it deals with voting in federal elections; in the latter, there was no perceived need for equal protection language and Congress in fact omitted it.[5] The legisla-

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[4] 18 U.S.C. § 372, in language almost identical to § 1985(1), provides criminal penalties for conspiracies to impede or injure federal officers. It is absurd to suggest that an invidiously discriminatory animus should be required under either the civil or criminal provision, and the courts have not imposed such a requirement.

[5] The District Court in Jones v. United States, 401 F. Supp. 168 (E.D. Ark. 1975), relied on Means v. Wilson, 522 F.2d 833 (8th Cir. 1975), cert. denied 424 U.S. 958 (1976), for the proposition that an invidiously discriminatory intent must be demonstrated for all clauses of § 1985(3), even in the absence of equal protection language. That case, however, involved a claim based on alleged irregularities in a tribal election, not the federal election of a

tive history discussed in Part I. demonstrates convincingly that the decision to require invidious discrimination only in those clauses not dealing with federal officials or processes was deliberate.[6]

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5 (continued) President, Vice-President or congressman. The court in Means was interpreting the first part of § 1985(3), which does contain equal protection language, and was not, as the district court claimed in Jones, imposing an invidious discrimination requirement in the absence of equal protection language.

[6]Assuming, arguendo, that a showing of class-based discriminatory animus is required under § 1985(2), clause one, Plaintiff has made a showing that he is a member of a cognizable class under 42 U.S.C. § 1985. The case law interpretations of § 1985 provisions make clear that the class being discriminated against need not be one of the traditionally "suspect" classes.

This was the ruling of the Ninth Circuit in Life Insurance Company of North America v. Reichardt, 591 F.2d 499 (9th Cir. 1979), where the court, concluded that women purchasers of disability insurance are a sufficient class to satisfy the requirements of 42 U.S.C. § 1985, and that the drafters of § 1985 "clearly intended to protect groups other than Southern blacks". Id. 505.

The Court in Reichardt also affirmatively cites Cameron v. Brock, 473 F.2d 608 (6th Cir. 1973); Azar v. Conley, 456 F.2d 1382 (6th Cir. 1972); Harrison v. Brooks, 446 F.2d 404 (1st Cir. 1971); and Means v. Wilson, 522 F.2d 833 (8th Cir. 1975), cert. den. 424 U.S. 958. In each of these cases, the courts involved recognized the possibility of non-traditional classes satisfying the require-

6 (continued) ments of § 1985. In Cameron, supra, the class recognized was that of supporters of a sheriff's opponent in a county election. In Azar v. Conley, supra, the possibility of a white middle-class family constituting a class was discussed, while in Harrison v. Brooks, supra, the Court said that property owners would constitute a cognizable class for purposes of § 1985. Finally, in Means v. Wilson, supra, the Indian supporters of a candidate for tribal council were considered a cognizable class under § 1985(3).

The actions of the defendants in causing the damage to plaintiff were actions taken to deny plaintiff the equal protection of the law by discriminating against Plaintiff because of his supposed lack of athletic prowess on the football field. Plaintiff was viewed by the defendants as a member of a distinct class of other previous and present A.S.U. football players who failed to measure up to defendants' standards of performance and who were thus, denied football scholarships.

Throughout the Complaint, at paragraphs 18, 19, 21, 23, 24, 25 and 26, there are allegations that Defendant Kush did not believe Plaintiff Rutledge was qualified to play football for A.S.U.

Paragraph 27 speaks of the N.C.A.A. rules which made it impossible for Defendant Kush to revoke Rutledge's scholarship because of this so-called "inability" of the Plaintiff to play football, thus forcing Kush to use illegal means to regain the use of the scholarship.

Paragraph 47 of plaintiff's Complaint sets out that this condition was not an isolated incident. There were many players who Kush felt failed to perform at a level worthy of retaining their scholarships. Against various members of this class of players, tactics similar to the ones used against Plaintiff have been used many times before. Defendant Kush hoped in each instance that the players would resign their scholarships and thus, make the scholarships available to others whom Kush deemed were more deserving.

III. The Holding of the U.S. Supreme Court In Griffin v. Breckenridge, 403 U.S. 88 (1971), That a Violation of Equal Protection Is Required Under § 1985(3), First Clause, Is Correct, But The Analysis Behind That Decision Is Not Applicable To § 1985(2), First Clause.

In Griffin, plaintiffs, black citizens of the State of Mississippi, sued in federal court under § 1985(3), alleging that defendants, also citizens of Mississippi, had conspired to stop plaintiffs' passage in their automobile on a public highway and to prevent them from seeking the equal protection of the laws and from enjoying the equal rights, privileges and immunities of citizens under the laws of the United States and Mississippi. The clause of § 1985(3) at issue in Griffin provides:

> If two or more persons in any State or Territory conspire or go

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6 (continued) The class of players who did not measure up to Defendant Kush's standards of performance was a cognizable class for purposes of 42 U.S.C. § 1985. Thus, plaintiff has stated a claim for relief pursuant to 42 U.S.C. § 1985, regardless of whether or not membership in a cognizable class is required by this Court.

> in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the law;"

The court held that in any action under § 1985(3), first clause, "there must be some racial or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action". Id. at 102. The court reached its holding by examining both the language and the legislative history behind § 1985(3), and in doing so revealed Congress' concern that jurisdiction over private conspiracies have some federal constitutional grounds. Congress had addressed this concern by adding the equal protection language to § 1985(3).

Defendants contend that because Griffin analyzed the historical setting surrounding the Civil Rights Act of 1871 and concluded that discriminatory animus was a requirement

under § 1985(3), the same requirement should be grafted onto § 1985(2), first clause. Defendant's argument fails to recognize the seperate constitutional jurisdictional bases for § 1985(2), first clause, and the part of § 1985(3) at issue in Griffin. The first clause of § 1985(2), unlike the second clause of the same provision or the first clause of § 1985(3), prohibits conspiracies to interfere with the integrity of the federal judicial system. It does not demand a denial of "equal protection of the laws", nor is an implication of such a requirement necessary to avoid constitutional challenge. Griffin is sound in its conclusion as to § 1985(3). The need to constitutionally anchor that section was made clear by the debates over the Civil Rights Act of 1871; however, no such mooring is necessary for § 1985(2), first clause.

Defendants advance the proposition at pages 24-25 of their Brief, that because the court in Griffin recognized the option that the plaintiffs' § 1985(3) claim could be constitutionally supported by Congress' power to protect the right of interstate travel, a right not necessarily emanating from the Fourteenth Amendment, it necessarily follows that it was not necessary to constitutionally ground the first clause of § 1985(3) in the Fourteenth Amendment. The response to Defendants' own argument is found in their statement that it is only "under certain circumstances" that § 1985(3) may be constitutionally supported by Congress' right to protect interstate travel. Congress may legislate as to interstate travel only, and § 1985(3), first clause, covers situations which in many instances involve only intra-state travel or simply occur "on the premises of another." Therefore, in order to provide

constitutional support for the broad base of possible situations designed to be remedied under § 1985(3), first clause, Congress based its power to legislate deprivations of civil rights by disguise on the highway or on the premises of another upon the Fourteenth Amendment. Although Defendants are correct in arguing that within the gambit of rights which are protected by the Fourteenth Amendment's equal protection clause, other constitutional rights may be implicated, they are incorrect in concluding that there is another satisfactory constitutional nexus which adequately protects the broad base concerns embodied in § 1985(3).

IV. An Interpretation of § 1985(2), First Clause, Which Would Not Require a Showing Of An Invidious Discriminatory Animus Would Not Lead To The Creation of A General Federal Tort Law or Other Practical or Conceptual Problems in Enforcing the Statute.

Defendants, under Part II of their Brief, present a collection of ancillary arguments which, although not meriting

lengthy discussion, should, at the very least, be promptly dismissed.

A. General Federal Tort Law.

There is no reason to fear, as Defendants argue, that permitting Congress to pass laws concerning the federal court system would spawn an uncontrollable body of federal tort law. Defendants' argument conjures up visions of claimants knocking down the federal courthouse doors in an effort to take advantage of a liberal federal provision. A look at the provisions of § 1985(2), first clause, however, dispels any such concern. While granting federal jurisdiction over all conspiracies to deprive citizens of constitutional rights, regardless of class-based animus, might indeed have far reaching effects, federal jurisdiction over all activities regarding the federal courts is well established and narrowly defined. Unlike the first clause of § 1985(3) or the second clause

of § 1985(2), the first clause of § 1985 (2) contains specifically articulated circumstances giving rise to a cause of action. Those causes of action can only exist if the claim is rightfully in the federal court system. Thus, the limitations are quite specific and do not lend themselves to any general federal tort law. The same cannot be said for the part of § 1985(3) at issue in Griffin v. Breckenridge. This point was acknowledged by the court in Rutledge:

> "[The first clause of § 1985(2)] was designed to protect the federal government's interest in its own courts....The teaching of Griffin v. Breckenridge, is not to the contrary. There the court sought to interpret § 1985(3) in a manner that was responsive to the desire of Congress to avoid the inescapable constitutional issue that would have attended enactment of a general federal tort law. This was accomplished by limiting the scope of that sub-section to those private conspiracies behind which lies some racial or class based invidiously discriminatory animus. Part one of § 1985(2) requires no such limitation because it is

> limited by its terms to private conspiracies designed to obstruct certain processes of 'any court of the United States.' This provision has within it no seeds from which could spring a general federal tort law." (Citations omitted). Rutledge, 660 F.2d, 1355.

B. Criminal Penalties and Civil Remedies for Preventing the Obstruction of Justice in Federal Courts.

Defendants cite criminal provisions governing obstructions of justice and posit that the existence of these criminal provisions exclude the possibility that Congress intended to enact civil remedies governing the same situations. Defendants' puzzling reasoning suggests that if criminal remedies exist, civil remedies should not. In fact, Congress provided civil damage actions under § 1985 (2), first clause, as an incentive to private litigants, taking into consideration, no doubt, that the individual injured is the best source for combatting conspiracies, since he or she has the best access to the

facts. A private damage remedy is a particularly logical solution to conspiracy to interfere with the judicial system, considering that by its very nature, a successful conspiracy against a juror, party or witness would go undetected by a judge or other official. Therefore, not only is it nonsensical to suggest that the existence of a criminal remedy available to the courts precludes a civil remedy available to a private litigant, but in the case of conspiracies against the federal court system, it undercuts efforts to achieve justice.

C. Standing.

Defendants' attempt to argue that a reading of § 1985(2) raises standing problems for Plaintiff. As support for this argument, Defendants discuss the facts of this case and suggest that since Plaintiff Rutledge was never personally

threatened or intimidated from attending federal court or from truthfully testifying in the federal court proceedings, he has no standing to sue under § 1985(2). In making this argument, Defendants failed to read the language of the remedial provision for violations under § 1985(2), first clause, which appears in § 1985(3) and provides:

> "[I]n any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators. (Emphasis added.)

The first clause of § 1985(2) provides a cause of action for conspiracy to obstruct justice, and the remedial provisions of § 1985(3) makes clear that it is the party injured or deprived by the conspiracy which has standing to sue and seek damages.

Plaintiff Rutledge was clearly the party damaged in the conspiracies involved here, since Plaintiff has alleged that material witnesses were threatened and intimidated from attending court and truthfully testifying in Plaintiff's action in federal court.

D. Damages.

Defendants argue that Plaintiff could not show that Defendants' intimidation of material witnesses caused any damage to Plaintiff. Defendants base this claim on their self-serving prediction that "the possibility of any claim proceeding to trial is remote" and that the intimidated "witnesses will quite likely not even have an opportunity to testify in federal court". Appellant's Brief, pages 28-29. Plaintiff obviously suffers real and tangible damage if material witnesses are intimidated from attending court or from testifying truthfully at his federal trial. This is the very kind of damage that § 1985 (2) was designed to remedy. As

for the possibility of any claim proceeding to trial, the Ninth Circuit specifically remanded the case "to the District Court to fix the precise extent to which res judicata and collateral estoppel will bar [Plaintiff] from seeking relief" because the record of the state court proceedings was not a part of the record before the Ninth Circuit. Rutledge, 660 F.2d at 1351. Similarly, the state court record is not a part of the record before this Court. Therefore, an inquiry into the possibility of any claim proceeding to trial in federal court (and the consequent damages under § 1985(2) due to this possibility) is not a proper issue before this Court.

E. Different Standards in the Federal Court in the State Court.

Petitioners conclude by complaint that the Ninth Circuit's interpretation of § 1985(2) would create different standards for actions brought in federal and state

court in connection with conspiracies to interfere with the respective court proceedings. It is not the prerogative of Congress to impose the federal courts' standards upon state courts' practices. Indeed, the very legal precedent established in cases such as Erie Railroad v. Tompkins, 304 U.S. 64 (1938) demonstrates the efforts of the federal courts to avoid super-imposing their will on the state system. On the other hand, the federal courts are not powerless to regulate the conduct which takes place in their own chambers. To the contrary, Article I., §8, clause 9, specifically grants power over the federal courts to Congress and the "necessary and proper" clause allows for legislation designed to insure the proper functioning of those courts. Addressing its own concerns, Congress had indeed created a provision which is not duplicated in many state

courts, just as it has done in many instances such as with the Federal Rules of Civil Procedure and Evidence. Such a recognition of the separation of the state and federal court system does not, however, serve as an indictment of the proper application of § 1985(2).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Ninth Circuit that a showing of racial or class-based invidiously discriminatory animus is not required in order for Plaintiff to state a cause of action under the first clause of § 1985(2).

RESPECTFULLY SUBMITTED this 15th day of September, 1982.

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APPENDIX

The text of §2 of the Civil Rights Act of 1871 at various stages in its development.

A. The first draft of §2 of the Civil Rights Act of 1871 as originally introduced in the House.

B. The amended draft of §2 of the Civil Rights Act of 1871 as introduced in the House by Representatives Cook and Shellabarger.

C. Section 2 in its final version, enacted on April 20, 1871.

D. 42 U.S.C. § 1985 in its present form.

APPENDIX A.

That if two or more persons shall, within the limits of any State, band or conspire together to do any act in violation of the rights, privileges, or immunities of another person, which, being committed within a place under the sole and exclusive jurisdiction of the United States, would, under any law of the United States then in force, constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal process or resistance of officers in discharge of official duty, arson, or larceny; and if one or more of the parties to said conspiracy shall do any act to effect the object thereof, all the parties to or engaged in said conspiracy, whether principals or accessories, shall be deemed guilty of a felony, and, upon conviction thereof, shall be liable and the crime shall be punishable as such in the courts of the United States. Congressional Globe, 42nd Congress, 1st Session 68-69.

APPENDIX B.

Sec. 2 That if two or more persons within any State or Territory of the United States shall conspire together to overthrow, or to put down, or to destroy by force the government of the United States, or to levy war against the United States, or to oppose by force the authority of the Government of the United States, or by force, intimidation, or threat to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take or possess any property of the United States against the will and contrary to the authority of the United States, or by force, intimidation, or threat to prevent any person from accepting or holding any office of trust or place of confidence under the United States, or from discharging the duties thereof, or by force, intimidation, or threat to induce any officer of the United States to leave any State, district, or place where his duties as such officer might lawfully be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or by force, intimidation, or threat to deter any witness in any court of the United States from testifying in any matter pending in such court fully, freely, and truthfully, or to injure any such witness in his person or property on account of his having so testified, or by force, intimidation, or threat to influence the verdict of any juror in any court of the United States, or to injure such person in his person or property on account of any verdict lawfully assented to by him, or shall conspire together for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for preventing or hinder-

ing the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, or to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws, each and every person so offending shall be deemed guilty of a high crime...and if any one or more persons engaged in such conspiracy - such as defined in the preceding section, shall do or cause to be done any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the person so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages against any one or more of the persons engaged in such conspiracy... Congressional Globe, 42nd Congress, 1st Session 477.

APPENDIX C.

Sec. 2 That if two or more persons within any State or Territory of the United States shall conspire together to overthrow, or to put down, or to destroy by force the government of the United States, or to levy war against the United States, or to oppose by force the authority of the government of the United States, or by force, intimidation, or threat to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, or by force, intimidation or threat to prevent any person from accepting or holding any office or trust or place of confidence under the United States, or from discharging the duties thereof, or by force, intimidation, or threat to induce any officer of the United States to leave any State, district, or place where his duties as such officer might lawfully be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duty, or by force, intimidation, or threat to deter any party or witness in any court of the United States from attending such court, or from testifying in any matter pending in such court fully, freely, and truthfully, or to injure any such party or witness in his person or property on account of his intimidation, or threat to influence the verdict, presentment, or indictment, of

any juror or grand juror in any court of the United States, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or an account of his being or having been such juror, or shall conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, or shall conspire together for the purpose of in any manner, impeding, hindering, obstructing, or defeating the due course of justice in any State or Territory, with intent to deny to any citizen of the United States the due and equal protection of the laws, or to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws, or by force, intimidation, or threat to prevent any citizen of the United States lawfully entitled to vote from giving his support or advocacy in a lawful manner towards or in favor of the election of any lawfully qualified person as an elector of President or Vice-President of the United States, or as a member of the Congress of the United States, or to injure any such citizen in his person or property on account of such support or advocacy, each and every person so offending shall be deemed guilty of a high crime, and, upon conviction thereof in any district or circuit court of the United States or district or supreme court of any Territory of the United States having

jurisdiction of similar offenses, shall be punished by a fine not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, as the court may determine, for a period of not less than six months nor more than six years, as the court may determine, or by both such fine and imprisonment as the court shall determine. And if any one or more persons engaged in any such conspiracy shall do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the persons so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages occasioned by such injury or deprivation of rights and privileges against any one or more of the persons engaged in such conspiracy, such action to be prosecuted in the proper district or circuit court of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts under the provisions of the act of April ninth, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindiction."

APPENDIX D.

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust or place of confidence under the United States, or from discharging any duties thereof or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or

attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State of Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Amicus Brief

No. 81-1675

Office - Supreme Court, U.S.
FILED
SEP 17
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FRANK KUSH, et al.,

Petitioners,

—v.—

KEVIN RUTLEDGE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE ARIZONA CIVIL LIBERTIES UNION, *AMICI CURIAE*, IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI*

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members, dedicated to preserving and protecting the fundamental rights of the people of the United States. The Arizona Civil Liberties Union is one of its state affiliates.

Among the most important federal statutory protections extended to the people of the United States are those in the Civil Rights Act of 1871. Because of our interest in the interpretation of that statute, we submit this Brief.

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* Letters from both parties consenting to the filing of this brief have been lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

This case involves the statutory interpretation of § 2 of the Civil Rights Act of 1871, presently codified as 42 U.S.C. § 1985. The question immediately before the Court is whether an invidiously discriminatory animus is required for all causes of action under 42 U.S.C. § 1985(2). We respectfully submit that such a showing is required only under the second subsection of § 1985(2), and not for respondent's cause of action under the first subsection of that provision.

Section 1985(2) evolved, with only inconsequential changes, from § 2 of the Civil Rights Act of 1871. That Act was enacted not only to promote racial equality and protect civil rights in the South, but also to restore civil authority and preserve order in the government and courts in the face of a rising tide of violence and resistence in the

South. The legislative history clearly indicates that Congress intended to reach to the limits of its constitutional power in order to stem this tide. Congress had, and knew that it had, power to enact legislation concerning the federal courts, and it took full advantage of that power.

The plain meaning of § 1985(2) reflects this congressional intent. The statute contains equal protection references only in those areas where Congress believed that it had no other basis for extending federal jurisdiction. No such language is included in those clauses of § 1985(2) dealing with witnesses in the federal courts because Congress had no need to or intention of limiting itself where it had full power to act.

This Court has stated that the civil rights statutes should be accorded a sweep as broad as their language.

United States v. Price, 383 U.S. 787, 801 (1966). In light of the clear meaning of the text of § 1985(2), and a legislative history which fully supports that meaning, the Ninth Circuit's ruling that an invidiously discriminatory animus is not required under the first subsection of § 1985(2) should be affirmed.

ARGUMENT

I. CONGRESS DID NOT INTEND LANGUAGE CONCERNING EQUAL PROTECTION TO APPLY TO ALL PARTS OF § 2 OF THE CIVIL RIGHTS ACT OF 1871, AND IN PARTICULAR DID NOT INTEND TO APPLY IT TO THE PROVISIONS OF THE FIRST SUBSECTION CONCERNING INTIMIDATION OF FEDERAL WITNESSES.

The predecessor of § 1985 was § 2 of the Civil Rights Act of 1871, also known as the Ku Klux Klan Act of 1871.[1/]

1/ The different versions of § 2, at various stages of its evolution, are set forth in the Appendix to this brief.

As we show infra, except for some facial reorganization of the statute in 1874, the provisions of the Act of 1871 later codified at 42 U.S.C. § 1985 have remained substantially unchanged from their enactment to the present. Close examination of the debates surrounding the Act of 1871 should, therefore, shed some light on the proper construction of § 1985(2).[2/]

2/ 42 U.S.C. 1985(2) currently provides as follows:

> (2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property

(footnote continued on following page)

As the first session of the Forty-Second Congress opened, apprehension was expressed by several Republicans about the insecurity of life and property in the South. On March 23, 1871, President Grant sent a message to Congress, urging legislation to curb violence in the South, since the States

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(footnote continued from preceding page)

> on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Throughout this brief, the portion of § 1985(2) before the first semicolon will be referred to as the "first subsection", and the portion after the semicolon as the "second subsection".

were apparently unable to control it. Grant's assessment of the situation was that "[A] condition of affairs now exists in some of the States of the Union rendering life and property insecure, and the carrying of mails and the collection of the revenue dangerous."[3/] Organized groups such as the Ku Klux Klan were, many felt, responsible for this terrorism. Upset by the wave of violence sweeping the South, many congressmen were determined to reach to the limits of Congress' power to stem this tide. It was against this backdrop of fear, anger and apprehension, not only for the safety of blacks in the South but for

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3/ Globe 236. Throughout this brief, "Globe" is used to refer to the Congressional Globe, 42d Congress, 1st Session, and "Globe App." is used to refer to the Appendix thereto.

white Republicans and federal employees as well, that the Civil Rights Act of 1871 was introduced.[4/]

Consideration of the Act opened with the introduction of the bill in the House by Representative Shellabarger on March 28, 1871.[5/] The Act originally consisted of four sections; § 2 eventually became 42 U.S.C. § 1985. The section, as originally introduced, was broad in scope and proposed to provide a federal remedy for a wide variety of offenses against individuals, including murder, mayhem and robbery.[6/]

4/ This Court has considered the historical circumstances and the debates surrounding the Civil Rights Act of 1871 in other contexts. See, for example, Monell v. New York City Department of Social Services, 436 U.S. 658 (1978), and the briefs filed in that case, and Griffin v. Breckenridge, 403 U.S. 88 (1971).

5/ Globe App. 67.

6/ See Appendix to this Brief, Part A.

The purpose of the bill, according to Shellabarger, was to supply the alleged deficiencies of the Enforcement Act of May, 1870, "It is alleged that that act, where it defines and punishes criminally a conspiracy of two or more persons to deprive a citizen of the United States of any right to which he is entitled under the Constitution and laws of the United States, falls worthless, because of its too great generality and vagueness in the description of the particular act that shall constitute the crime. It is any conspiracy to deprive a citizen of any right."7/ Shellabarger was also concerned that the protections afforded by the Enforcement Act of 1871 were intended to have as wide a scope as possible.

7/ Globe App. 68.

Shellabarger then proceeded to a discussion of anticipated constitutional objections to § 2, "that the act it seeks to punish, being committed within a State, can only be defined and punished as crime under State law," and that "in attempting this legislation Congress blots out the jurisdiction and power of the States."[8/] His response was that Congress had the power to enforce by legislation any constitutional provision, and, historically, had always exercised this power against the State as well as directly against persons.

Much of the debate which followed focused on the federalism issues raised by § 2. The Democrats, as Shellabarger had anticipated, objected to § 2 on constitutional grounds as dangerous to liberty and states' rights. Many of the

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8/ Globe App. 69.

Republicans joined the Democrats in this objection.[9/] The states, they asserted, possessed exclusive jurisdiction to make criminal codes, and Congress had no right to preempt these codes. In addition, the Democrats claimed that the Fourteenth Amendment, by its terms, gave Congress authority to act only in cases involving action by the states, rather than actions by private individuals. Finally, the Democrats claimed that reports of violence in the South were exaggerated.

The Republicans responded that Congress did have the power to deal directly with individual violations of the Constitution, especially where, as here, the States had failed to effectively protect those rights. Representative Hawley expressed the view that while

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9/ See, e.g., Globe App. 113 (Rep. Farnsworth).

Congress had no power to enact a general criminal code, it did have power to punish combinations to prevent persons from exercising constitutional rights such as the right to vote or hold federal office.[10/] The Republicans also insisted that the effort to deprive individuals of their constitutional rights in the South was widespread, and that, in many instances, state officials willfully refused to protect individuals or prosecute offenders. Representative Kelley of Pennsylvania asked: "In what southern state has any Ku Klux been tried or convicted?"[11/] Others expressed similar concerns that the judicial process in the South was corrupt and dominated by

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10/ Globe 382-3.

11/ Globe 416.

the Ku Klux Klan.[12/]

12/ Representative Stoughton quoted the following testimony of Thomas W. Willeford, a former member of the Klan, before a congressional committee concerning the intimidation of witnesses:

Question: Have you ever heard of a Ku Klux being convicted of any offense there?

Answer: No, sir.

Question: Was there anything in the obligation you took or the rules of the order as to your being obliged to defend men by your oaths, or otherwise?

Answer: Yes, sir; if he could get you in as a witness you had to swear him out, let you be swearing a lie or not. If you swore against him, why you might just as well be a traveling at once.

Question: You mean by that you would be in danger of your life from the order?

Answer: Yes, sir.

Question: Anything about getting on the jury?

Answer: Yes, sir; if we could get on the jury we could save him, do what you please.

Question: No matter what the proof?

Answer: Yes, sir. You could not bring proof enough to convict."

Globe 320-21.

As a result of this debate, an amended form of § 2 was introduced by Representatives Cook and Shellabarger.[13/] This draft contained a list of several offenses directly against agencies or officials of the United States, which conspicuously lacked any requirement that connection to a deprivation of equal protection be shown, followed by several clauses which did contain equal protection language and provided remedies for conspiracies to deprive "any person or class of persons of the equal protection of the laws, or of equal privilege or immunities under the laws." With respect to the first group of offenses, Shellabarger observed that many of them were already included in a federal law enacted in 1861. The equal protection portion, Shellabarger noted,

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13/ See the Appendix to this brief, Part B.

was designed to limit the reach of federal jurisdiction over private conspiracies "which shall attack the equality of rights of American citizens,"[14/] and thus to meet the criticisms leveled against § 2 as originally introduced.

Representative Cook, one of the authors of the amendment,[15/] explained the logic behind the first group of clauses in the amended version of § 2:

> [A] citizen of the United States, in any State of the Union, has a right to vote for any officer of the United States Government. He has a right to have his cause tried within a United States Federal court where that court has jurisdiction of the case. Now, if there be any combination of men who shall combine and conspire together for the purpose of preventing a legal voter from giving his vote or a witness from testifying in a court of the United States in a proper case as to compel a jury in a United States court to give a false verdict, or to punish him

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14/ Globe 478.

15/ Id.

> for giving a true verdict, or to punish a witness for testifying truthfully, that combination is an offense against the United States; for the simple reason, easily understood, that it seeks to deprive a citizen of the United States of a right guaranteed to him by the Constitution of the United States. If you can touch in any point or particle any right of a citizen secured by the same logic, overthrow the entire Constitution and destroy the whole Government. If we have not a right to legislate for the defense of every right secured by the Constitution we have no authority to legislate for the security of any right. That seems to be perfectly plain.... The citizen, in the support or advocacy of national Government, is exercising a right secured to him clearly by the fundamental law of this nation. Hence a combination to deprive the citizen of that right, or to punish him for its exercise, is an offense against the United States, and may be so declared and punished by national law. 16/

Representative Cook later spoke of the Fourteenth Amendment as an additional source of rights to be protected by the

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16/ Globe 486.

Act.[17] Cook, one of the Amendment's authors, understood access to federal courts and equal protection to be two separate rights guaranteed under separate provisions of the Constitution.

Senator Thurman, a Democrat, commented upon § 2 when consideration of the bill moved to the Senate. With respect to the first subsection of § 2, Senator Thurman did not question Congress' power to deal with offenses concerning federal processes:

> These are to be crimes. Most of them are already crimes, I believe. I think most of them are; but I do not doubt the power of Congress to pass such a law as that. Congress has power to punish a conspiracy to commit treason, although there is no overt act. There can be no treason without an overt act, for the Constitution defines what treason shall be and requires an overt act. But I am willing to admit, at least that is my present impression, that it is competent for Congress to punish a

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17/ Id.

> conspiracy to deter or intimidate Federal officers from discharging their duties or to drive them out of their proper jurisdictions. All that may be necessary in order that the laws of the United States may be executed; that is to say, the presence of the officers there and their free and unterrified discharge of their duties are essential to the execution of the laws, and under the power which Congress has to pass all laws necessary for the execution of the power conferred upon the Government or any department or officer thereof, it is competent for it to enact laws to punish a conspiracy that shall thus tend to prevent the officers from executing the Federal laws. 18/

Thurman did object, however, to the portion containing equal protection language. He felt that the standard was too vague, and that local officials would find the standard difficult to understand and enforce.19/ Senator Thurman's speech makes clear that he did not con-

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18/ Globe App. 217.

19/ Globe App. 218. Senator Thurman's remarks refer to criminal enforcement because § 2 originally contained both criminal and civil remedies.

sider the equal protection language to apply to the clauses in § 2 dealing with direct federal offenses.[20]

The Senate approved § 2, with some minor additions, and most of the remaining discussion focused on the Sherman Amendment, which is not relevant here.[21] The entire bill was passed on April 20, 1871, and became law shortly thereafter.[22]

20/ Most of the debate on the bill as amended focused on the clauses with equal protection language. The Brief for Petitioners cites several passages in which the class-based animus requirement is authority to reach private conspiracies. See, e.g., id. at 17, 19, 20. When examined in context, however, it is clear that these passages discuss deprivations where an equal protection requirement was considered necessary, and therefore included, because no other federal nexus was present. Those passages did not purport to address the other deprivations covered by the Act where the federal nexus was already present, such as the cause of action at issue here.

21/ See Monell, supra.

22/ See the Appendix to this brief, Part C.

By the Act of June 20, 1874, Congress authorized Secretary of State Hamilton Fish to prepare for publication and distribution the Revised Statutes of the United States, to which Secretary Fish finally affixed his seal on February 22, 1875. As the courts in Kimble v. McDuffy, 648 F.2d 340, 345 (5th Cir. 1981), and Brawer v. Horowitz, 535 F.2d 830, 838 (3d Cir. 1976), observed, the purpose of Secretary Fish's project was to collect and reorganize all federal laws and statutes, making minor changes in language only where necessary to accommodate the consolidation. The wording and meaning were otherwise wholly unchanged. In the course of this project Secretary Fish reorganized the clauses of § 2 of the 1871 Act, but the changed organization preserved, as was intended, the original meaning of § 2. The statute has remained unchanged to this day,

and is now codified as 42 U.S.C. § 1985. Each part of § 1985 was originally part of § 2 of the Act of 1871. It is only because Secretary Fish apparently felt that all clauses dealing with courts and the judicial system should appear together that § 1985(2) assumed its present form.

* * * * * * *

Several conclusions can be drawn from this examination of the legislative history. First, the discussions reveal that the Civil Rights Act of 1871 was designed to combat violence and terrorism in every way which was constitutionally permissible. Intimidation of witnesses and corruption of the political process by the Ku Klux Klan were some of the evils which Congress intended to remedy. Although most of the controversy centered

on Congress' jurisdiction over the actions of private individuals under the Fourteenth Amendment, the debates make it clear that Congress did not intend to limit itself to remedies under the Fourteenth Amendment exclusively.

Section 2, as originally introduced by Shellabarger, met with considerable opposition. The Democrats, as well as some of the Republicans, doubted whether Congress had jurisdiction over matters traditionally covered by state criminal codes. As a result, the section was redrafted to provide remedies only where some sort of federal nexus was clearly present. This connection took one of two forms. If any agency or officer of the United States was involved, if treason or disloyalty was alleged, or if election to a federal office was concerned, Congress had undoubted power to act -- even without

reliance on the newly granted powers of the Fourteenth Amendment -- in order to bring private conspiracies clearly within the scope of the power conferred by the Constitution. No allegation of an equal protection violation was thought necessary. However, if the violation of rights had no such direct federal involvement, then Congress believed that the statute required an allegation concerning intent to deny equal protection in order to bring private conspiracies clearly within the scope of the power conferred by Fourteenth Amendment and to avoid an excessive overlap with state criminal codes. Congress intended to extend its reach as far as possible under the Constitution. There is no indication that Congress intended to limit § 2 by requiring invidious discrimination in an action for harrassment of witnesses in federal court. Not a single senator or congress-

man urged that view.

II. THE TEXT OF § 1985(2) CLEARLY AND UNAMBIGUOUSLY APPLIES EQUAL PROTECTION LANGUAGE ONLY TO THE SECOND SUBSECTION.

The legislative history just outlined sheds considerable light on the meaning of § 1985(2), and demonstrates that its syntax was deliberately chosen in light of the 42nd Congress' understanding of constitutional limitations on the reach of federal jurisdiction. Even apart from its legislative history, however, the plain wording of § 1985(2) compels the conclusion that its equal protection language applies only to its second subsection.

A semicolon now separates these two subsections, which were introduced separately and, in the Act of 1871, were separated by additional clauses. The two subsections were lumped together in 1875

because, apparently, Secretary of State Fish, who was in charge of the revision, thought they belonged together, since both dealt with court systems. The punctuation of § 1985(2) both before and after revision, however, makes clear that the equal protection language applies only to the second subsection. Thus, considering the subsections independently does not require "hypertechnical analysis of the structure and grammar of the section," as suggested in Kimble, supra, 648 F.2d at 347, but only the realization that the subsections evolved separately, with separate jurisdictional bases.

Analysis of § 1985 as a whole reveals that the statute is not worded haphazardly, "liberally laced with references to 'the equal protection of the law'," [23] but rather

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23/ Kimble, supra, 648 F.2d at 347.

is carefully phrased to mean exactly what it says.[24] Section 1985(1) deals with conspiracies to interfere with United States officials in the discharge of their duties; therefore, no equal protection language was needed or included for § 1985(1).[25] Section 1985(2) includes equal protection language when it refers to state courts, in subsection 2. There is no reference to equal protection in the first subsection of § 1985(2), dealing with federal courts. Section 1985(3) does contain equal protection clauses,

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24/ The full text of § 1985 is set forth in Appendix D to this brief.

25/ 18 U.S.C. § 372, in language almost identical to § 1985(1), provides criminal penalties for conspiracies to impede or injure federal officers. It seems absurd to suggest that an invidiously discriminatory animus should be required under either the civil or criminal provision, and the courts have not imposed such a requirement.

except where it deals with voting in federal elections; in the latter, there was no perceived need for an equal protection clause, and Congress in fact omitted it.[26/] The legislative history canvassed in Point I demonstrates that the congressional decision to require invidious discrimination only in those clauses not dealing with federal officials

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26/ The district court in Jones v. United States, 401 F. Supp. 168 (E.D. Ark. 1975), relied on Means v. Wilson, 522 F.2d 833 (8th Cir. 1975), cert. denied 424 U.S. 958 (1976), for the proposition that an invidiously discriminatory intent must be demonstrated for all subsections of § 1985(3), even in the absence of equal protection language. That case, however, involved a claim based on alleged irregularities in a tribal election, not the federal election of a President, Vice President or congressman. The court in Means was interpreting the first part of § 1985(3), which does contain equal protection language, and was not, as the district court claimed in Jones, imposing an invidious discrimination requirement for the other parts in the absence of equal protection language.

or processes was deliberate.[27/]

Griffin v. Breckenridge, supra, is not to the contrary. That case interpreted the first subsection of § 1985(3) which included equal protection language. The Court reached its holding that an invidiously discriminatory animus was a required element of an action under that subsection of § 1985(3) by examining

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27/ When the evolution of the statute is considered, the interrelationship of § 1985(2) and § 1985(3) is clear. The remedial section was originally placed at the end of § 2 of the Act of 1871, and applied to all of its clauses. In the course of the 1874 revision, this remedial clause was placed at the end of § 1985(3), although it properly applies to all sections of § 1985. Equal protection language, on the other hand, appeared only in those clauses to which it was meant to apply, as noted supra, and the 1874 revision preserved this careful wording. There is no reason to believe, as suggested in the Brief for Petitioners at 15, that the equal protection language in § 1985(3) should apply to all of § 1985 simply because the remedial portion does.

both the language and the legislative history, which showed only the congressional perception of a lack of jurisdiction over private conspiracies without some federal involvement for which the equal protection language was supplied. However, there is no such language intended to apply to that subsection. Furthermore, there is no reason to fear, as the courts did in Jones and Kimble, that permitting Congress to pass laws concerning the federal court system would spawn an uncontrollable body of federal tort law.[28/] While granting federal jurisdiction over all conspiracies to deprive citizens of constitutional rights, regardless of class-based animus, might indeed have far-reaching effects, federal jurisdiction over all activities regarding the federal courts is well-established

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28/ Kimble, supra, 645 F.2d at 353 (Sam Johnson, J., dissenting).

and narrowly defined. The reasoning used in Griffin simply does not apply to this case.[29/]

29/ The Fifth Circuit, in Kimble, supra, and the district court in Jones, in holding that an invidiously discriminatory intent was required for causes of action under the first subsection of § 1985(2), thought that result was mandated by Griffin. The Eighth Circuit in Jones v. United States, 537 F.2d 269 (8th Cir. 1976), cert. denied, 429 U.S. 1039 (1977), affirmed the district court's holding almost without discussion. Three circuit courts, on the other hand, have decided, after examining the statute and its history, that the equal protection language does not apply to the first subsection of § 1985(2). See Rutledge v. Arizona Board of Regents, 660 F.2d 1345 (9th Cir. 1981); McCord v. Bailey, 636 F.2d 606 (D.C. Cir. 1980), cert. denied, 451 U.S. 983 (1981); Brawer v. Horowitz, 535 F.2d 830 (3d Cir. 1976). See also Judge Sam Johnson's dissent in Kimble v. McDuffy, supra. In addition, the Seventh Circuit, in Stern v. United States Gypsum, Inc., 547 F.2d 1329 (7th Cir.), cert. denied, 434 U.S. 975 (1977), held that invidiously discriminatory intent was not required in a § 1985(1) clause which contained no equal protection language, and indicated, in dictum, that the same analysis would apply to § 1985(2). Commentators who have considered the question have also decided that Congress did not intend all of § 1985 to be subject to the equal protection requirement. See Comment, Civil Rights - Private Actions

(footnote continued on following page)

Congress intended to apply the equal protection language only to specific clauses of § 1985. To hold otherwise, this Court would have to don the legislators' robe and rewrite the statute. "Where the statutory language and the legislative history clearly indicate the purpose of Congress that purpose must be upheld." Hudson Distributors v. Eli Lilly & Co., 377 U.S. 386, 395 (1964).

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Ninth Circuit that the invidiously discriminatory

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(footnote continued from preceding page)

Under 42 U.S.C. § 1985(2) For Conspiracies to Impede the Due Course of Justice, 27 Kansas Law Review 621 (1979); and Comment, Civil Rights Conspiracy - A Plaintiff Need Not Prove Class-Based Invidiously Discriminatory Animus to Recover Under the First Clause of 42 U.S.C. § 1985(2), 50 University of Cincinnati L.Rev. 158 (1981).

intent requirement does not apply to respondent's cause of action based on a conspiracy to intimidate witnesses and prevent them from appearing in federal courts on his behalf.

Respectfully submitted,

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Dated: September 15, 1982

* Counsel wishes to thank Gary Hnath, a student at Harvard Law School for his invaluable assistance in the preparation of this brief.

APPENDIX

The Text of Section 2 of the Civil Rights Act of 1871 at Various Stages in its Development:

APPENDIX A

§ 2 of the Civil Rights Act of 1871 as originally introduced:

> That if two or more persons shall, within the limits of any State, band or conspire together to do any act in violation of the rights, privileges, or immunities of another person, which, being committed within a place under the sole and exclusive jurisdiction of the United States, would, under any law of the United States then in force, constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal process or resistance of officers in discharge of official duty, arson, or larceny; and if one or more of the parties to said conspiracy shall do any act to effect the object thereof, all the parties to or engaged in said conspiracy, whether principals or accessories, shall be deemed guilty of a felony, and upon conviction thereof, shall be liable, &c., and the crime shall be punishable as such in the courts of the United States.

Globe App. 68-9.

APPENDIX B

Amended Form of § 2 of the Act of 1871 Introduced in the House by Representatives Cook and Shellabarger:

> Sec. 2 That if two or more persons within any State or Territory of the United States shall conspire together to overthrow, or to put down, or to destroy by force the government of the United States, or to levy war against the United States, or to oppose by force the authority of the Government of the United States, or by force, intimidation, or threat to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take or possess any property of the United States against the will and contrary to the authority of the United States, or by force, intimidation, or threat to prevent any person from accepting or holding any office of trust or place of confidence under the United States, or from discharging the duties thereof, or by force, intimidation, or threat to induce any officer of the United States to leave any State, district, or place where his duties as such officer might lawfully be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or by force, intimidation, or threat to deter any witness in any court of the United States from testifying in any mat-

ter pending in such court fully, freely, and truthfully or to injure any such witness in his person or property on account of his having so testified, or by force, intimidation, or threat to influence the verdict of any juror in any court of the United States, or to injure such person in his person or property on account of any verdict lawfully assented to by him, or shall conspire together for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, or to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws, each and every person so offending shall be deemed guilty of a high crime ... and if any one or more persons engaged in such conspiracy, such as is defined in the preceding section, shall do or cause to be done any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the person so injured or deprived of having and exercising such rights and privileges may have and maintain for the recovery of dam-

ages against any one or more of the persons engaged in such conspiracy ....

Globe 477.

APPENDIX C

§ 2 in its Final Version, Enacted on April 20, 1871:

> Sec. 2 That if two or more persons within any State or Territory of the United States shall conspire together to overthrow, or to put down, or to destroy by force the government of the United States, or to levy war against the United States, or to oppose by force the authority of the government of the United States, or by force, intimidation, or threat to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, or by force, intimidation, or threat to prevent any person from accepting or holding any office or trust or place of confidence under the United States, or from discharging the duties thereof, or by force, intimidation, or threat to induce any officer of the United States to leave any State, district, or place where his duties as such officer might lawfully be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or to injure his person while engaged in the lawful discharge of the duties of his office, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duty, or by force, intimidation, or

threat to deter any party or witness in any court of the United States from attending such court, or from testifying in any matter pending in such court fully, freely, and truthfully, or to injure any such party or witness in his person or property on account of his intimidation, or threat to influence the verdict, presentment, or indictment, of any juror or grand juror in any court of the United States, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or on account of his being or having been such juror, or shall conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, or shall conspire together for the purpose of in any manner, impeding, hindering, obstructing, or defeating the due course of justice in any State or Territory, with intent to deny to any citizen of the United States the due and equal protection of the laws, or to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws, or by force, intimidation, or threat to prevent any citizen of the United States lawfully

entitled to vote from giving his support or advocacy in a lawful manner towards or in favor of the election of any lawfully qualified person as an elector of President or Vice-President of the United States, or as a member of the Congress of the United States, or to injure any such citizen in his person or property on account of such support or advocacy each and every person so offending shall be deemed guilty of a high crime, and upon conviction thereof in any district or circuit court of the United States or district or supreme court of any Territory of the United States having jurisdiction of similar offences, shall be punished by a fine not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, as the court may determine, for a period of not less than six months nor more than six years, as the court may determine, or by both such fine and imprisonment as the court shall determine. And if any one or more persons engaged in any such conspiracy shall do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the persons so injured or deprived of such rights and privileges may have and maintain an action to be for the recovery of damages occasioned by such injury or deprivation of rights and privileges against any one or more of the

persons engaged in such conspiracy, such action to be prosecuted in the proper district or circuit court of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts under the provisions or the act of April ninth, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication."

APPENDIX D

42 U.S.C. § 1985 in its Present Form:

§ 1985 Conspiracy to interfere with with civil rights

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to in jure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his per-

son or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his proprty for lawfully enforcing, or attempting to enforce the right of any person, or class of persons, to the equal protection of the laws;

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force,

intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.
R.S. § 1980.

Docket Sheet

NO. 81-1675-CFX	TITLE	Frank KUSH, et al., Petitioners v. Kevin Rutledge

DOCKETED	COURT
March 8, 1982	United States Court of Appeals for the Ninth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioners: Michael L. Gallagher
	Counsel for Respondent:
March 8, 1982	Petition for writ of certiorari filed. (Record filed).
Apr. 14, 1982	DISTRIBUTED. 4-30. (Stricken)
Apr. 27, 1982	Response requested.
May 26, 1982	Brief for the respondent in opposition filed.
June 1, 1982	DISTRIBUTED. 6-17
June 21, 1982	DISTRIBUTED. SUSPA 6-24.
June 24, 1928	REDISTRIBUTED. 6-30.
July 2, 1982	The petition for a writ of certiorari is GRANTED limited to Question 2 presented by the petition.

Aug. 18, 1982	Brief of petitioners' filed.
Aug. 18, 1982	Joint appendix filed.
Sept. 17, 1982	Brief, amici curiae, for The American Civil Liberties Union and the Arizona Civil Liberties Union in support of respondent filed.
Sept. 17, 1982	Brief for the respondent filed.
Nov. 17, 1982	CIRCULATED.
Jan. 12, 1983	ARGUED.